No. 12,153

IN THE

United States Court of Appeals

For the Ninth Circuit

SOUTHERN PACIFIC COMPANY, a corporation,

Appellant,

vs.

JOHN MARTIN SOUZA, LUCILLE JOSEPHINE SOUZA, JAMES LAWRENCE SOUZA, BENJAMIN SOUZA, minors, by and through their Guardian ad Litem, JOSEPHINE SOUZA, JOSEPHINE SOUZA, individually, and MARY ADELE SOUZA and GERALDINE SOUZA, LAWRENCE SOUZA and RICHARD SOUZA, Minors, by and through their Guardian ad Litem, H. G. EASTMAN,

Appellees.

Appellant's Opening Brief

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SOUTHERN PACIFIC COMPANY, a corporation,

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JOHN MARTIN SOUZA, LUCILLE JOSEPHINE SOUZA, JAMES LAWRENCE SOUZA, BENJAMIN SOUZA, minors, by and through their Guardian ad Litem, JOSEPHINE SOUZA, JOSEPHINE SOUZA, individually, and MARY ADELE SOUZA and GERALDINE SOUZA, LAWRENCE SOUZA and RICHARD SOUZA, Minors, by and through their Guardian ad Litem, H. G. EASTMAN,

Appellees.

Appellant's Opening Brief

I.

PLEADINGS, PROCEEDINGS AND JURISDICTION

About 9:02 A.M. on October 11, 1945, at the intersection of Beckwith Road and the main line track of Southern

Pacific Company, Stanislaus County, California, an "unguarded" grade crossing two miles or more north of Modesto, a Southern Pacific Company light engine, No. 2478[1] running north (railroad west) as train 2/59, struck a Ford Coupe automobile which was going east (see pleadings, R. 4, 5, 8, 9, 14, 15, 18, 24 and 28). The Ford Coupe was owned and operated by John Martin Souza, a minor (R. 7, 75, 98). Riding with him were his father, Antonio Azevedo Souza, and his brother, Edward A. Souza. Antonio and Edward were killed. John was slightly injured. The automobile was demolished. E. S. Glanville was the engineer, and H. J. Johnston was the fireman of the locomotive (see pleadings R. 4, 5, 8, 9, 15, 17, 18, 24, 28, and R. 98-100, 218-219, and 421). Engineer Glanville died before the trial (R. 41, 42, 46, 53, 55, 84, 85, 228).

On August 12, 1946 three actions were commenced in the Superior Court of the State of California in and for the City and County of San Francisco, No. 356,358 by Josephine Souza and the surviving Souza children for $151,157.38 damages on account of the death of the husband and father, Antonio, No. 356,359 by John Martin Souza (by his guardian *ad litem*) for $15,650.00 damages for injuries to himself and damage to his automobile, and No. 356,360 by Geraldine Souza, the wife of, and by the children of, Edward (by their guardian *ad litem*) for $151,129.38 damages on account of the death of Edward. In each action the defendants named were Southern

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1. This is the number given in the pleadings. This is incorrect. The number was 2487 (R. 91, 92). Nothing turns on the number.

Pacific Company, Glanville, the engineer, and Johnston,[2] the fireman. The charges were the same in each complaint and were that "said defendants, and each of them, so carelessly and negligently operated and propelled defendants' locomotive, as aforesaid, as to cause said engine to collide with the automobile" driven by John and in which Antonio and Edward were riding (R. 5, 9, 15) (Complaints R. 2-17).

Defendants Southern Pacific Company and Glanville appeared and answered in each action (R. 17-32), admitted the accident, denied all charges of negligence (R. 19, 25, 29) and set up various separate defenses: Contributory negligence of each occupant of the Ford Coupe, that the negligence of the driver, John Martin Souza, was the sole proximate cause of the accident, and that John Martin Souza was guilty of negligence which was a proximate cause of the accident and that this negligence was imputable to his father and brother because all were engaged in a joint undertaking and venture (R. 21, 31) and John was their agent (R. 22, 32) and to the father on the additional ground that John was a minor, driving with the father's consent[3] and California Vehicle Code

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2. Although plaintiffs served Johnston with summons and complaint and took his deposition, they elected not to proceed against him. He never appeared and plaintiffs dismissed as to him (R. 200 et seq.).

3. The facts, that John was a minor and was driving with his father's consent (the father was in the coupe) appear from the pleadings and were conceded in the plaintiffs' opening statement (R. 77).

§352(b)[4] applied.[5] [6]

By stipulation of April 1, 1947, and order of April 10, 1947, the three actions were "consolidated into one action" entitled John Martin Souza, et al., Plaintiffs, vs. Southern Pacific Company, et al., Defendants, No. 356,358, Consolidated Cause (R. 33, 34).

The Consolidated Cause came on for trial on April 19, 1948 before the Superior Court of the State of California in and for the City and County of San Francisco, and the

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4. Cal. Veh. Code §352(b) provides: "Any negligence or wilful misconduct of a minor whether licensed or not under this code in driving a motor vehicle upon a highway with the express or implied permission of the parents or the person or guardian having custody of the minor shall be imputed to such parents or such person or guardian for all purposes of civil damages, and such parents or such person or guardian shall be jointly and severally liable with such minor for any damages proximately resulting from such negligence or wilful misconduct."

5. *Milgate v. Wraith,* 19 C.2d 297, 121 P. 2d 10; *Rawlins v. Lory,* 44 C.A.2d 20, 111 P.2d 973; *Solloway v. Watts,* 58 C.A.2d 595, 137 P.2d 477; *Grover v. Sharp etc. Co.,* 66 C.A.2d 736, 153 P.2d 83 (hr. den.).

6. Cal. Veh. Code §352(b) imputes negligence to the parent for all purposes so that the negligence of the minor will be a defense to an action brought on behalf of the parent or for the parent's death This was recognized in *Solloway v. Watts,* supra, at page 597 where the court said: "The imputation of negligence to a parent is not limited to actions of third persons against the parent but it extends to actions in which the parent seeks redress and damages. The imputation extends to all cases where the rights and obligations of parents are invoked in civil actions for damages. Such was the holding in *Milgate v. Wraith,* 19 Cal. 2d 297 [121 P.2d 10], where the negligence of a person using an automobile with permission of the owner was involved and where under a code provision similar to the one above quoted the obligations of the owner were determined." See also *Milgate v. Wraith,* so construing the identical language used in §402 of the Vehicle Code.

fact of death of defendant E. S. Glanville was suggested to the court, whereupon the plaintiffs, by their counsel, announced themselves as ready for trial without having had summons and complaint in said consolidated cause, or any of the three actions thereof, served upon defendant H. J. Johnston or any of the defendants sued by fictitious names and without continuing the cause for the service of summons and complaint on any of said defendants. By so announcing themselves as ready for trial, plaintiffs thereby voluntarily elected to proceed with the action against defendant Southern Pacific Company alone, and such election amounted to a complete severance of the action as to the non-resident Southern Pacific Company, and there existed in said action a separable controversy between the resident plaintiffs and the non-resident defendant Southern Pacific Company. Upon the announcement by plaintiffs to proceed with the trial, said action, which prior to and up to the time of said announcement had not been removable to a United States District Court, thereupon and for the first time became removable to the proper United States District Court. Appellant Southern Pacific Company thereupon filed its verified petition for removal of the action to the District Court of the United States in and for the Northern District of California, Southern Division and duly made and filed with said petition its bond (R. 35-45). Prior to filing said petition appellant gave notice thereof, and after the filing of said petition and bond they were duly presented to the Superior Court, and the court having considered the same, made its order accepting the bond as good and sufficient and ordered that the consolidated cause be removed to the District Court of the United States in and for the Northern District of California, Southern Division (R. 46-47).

On May 3, 1948, appellant Southern Pacific Company filed the certified copy of the record on removal from the Superior Court of the State of California in and for the City and County of San Francisco with the Clerk of the District Court of the United States for the Northern District of California, Southern Division, and said consolidated cause was thereupon designated as No. 28040-R in the records of the District Court (R. 2).

On May 24, 1948 plaintiffs, pursuant to notice of motion therefor, made a motion to remand the consolidated cause to the Superior Court of the State of California in and for the City and County of San Francisco on the grounds stated in its written notice of motion to remand (R. 48-54). Plaintiffs' motion to remand was denied by a written order dated June 28, 1948 (R. 55).

The consolidated cause was tried July 20-23, 1948 (R. 56, 57, 73, 403), a motion for a directed verdict in favor of defendant and appellant Southern Pacific Company was made (R. 359-360) and denied (R. 360), and a verdict of $1150 in favor of John Martin Souza, the driver,[7] $31,047.38 for the death of Edward A. Souza,[8] and $16,-157.38 for the death of Antonio A. Souza[9] was returned against appellant. Judgment was entered on the verdict for appellees and against appellant on July 26, 1948 (R. 57).

Appellant, on July 31, 1948, served and filed its notice of motion for judgment notwithstanding the verdict and for new trial (R. 59-63). The motions were denied on

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7. For injury to him and damage to the Ford Coupe.

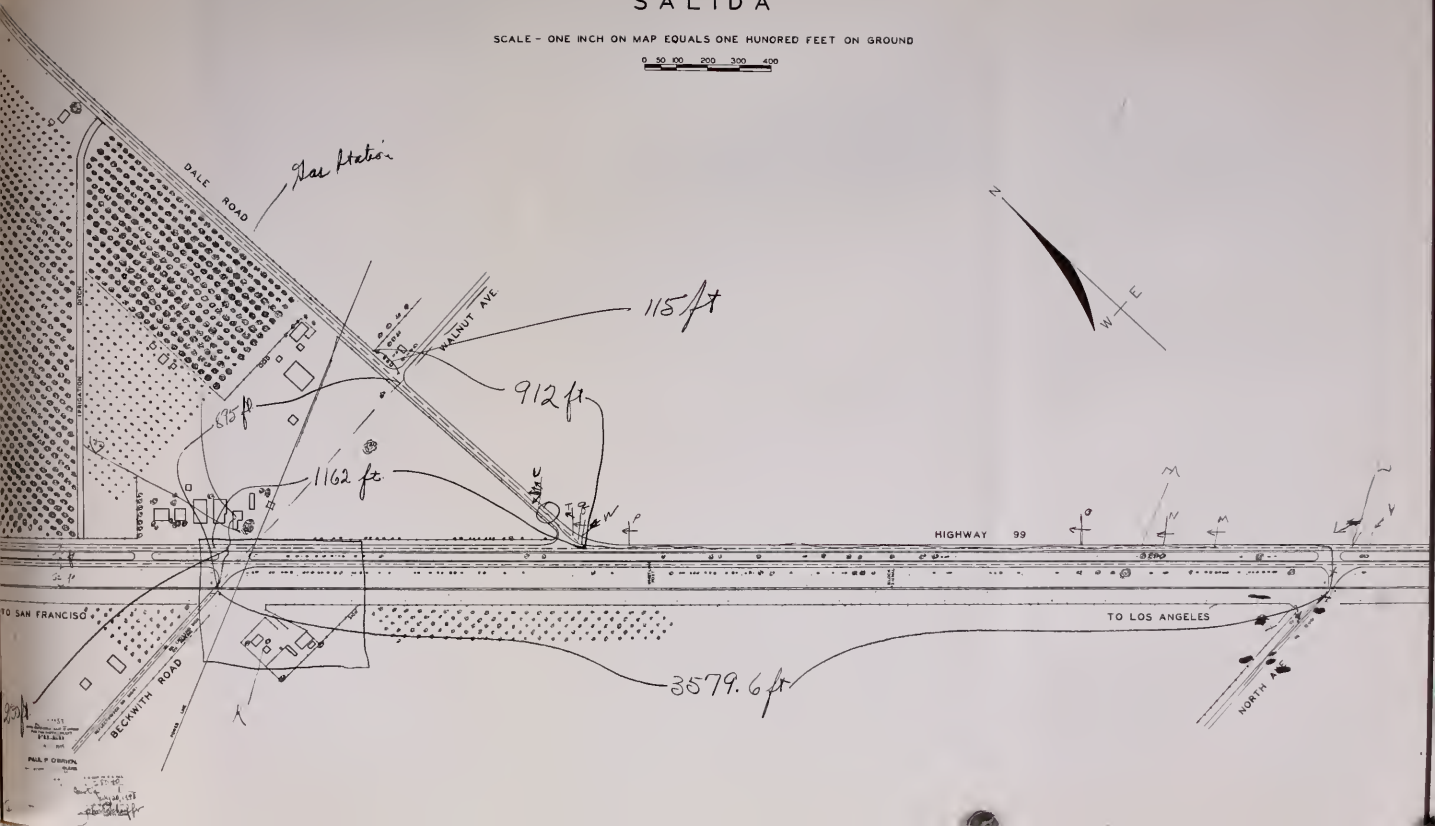
8. The son and brother. In favor of his widow and children.

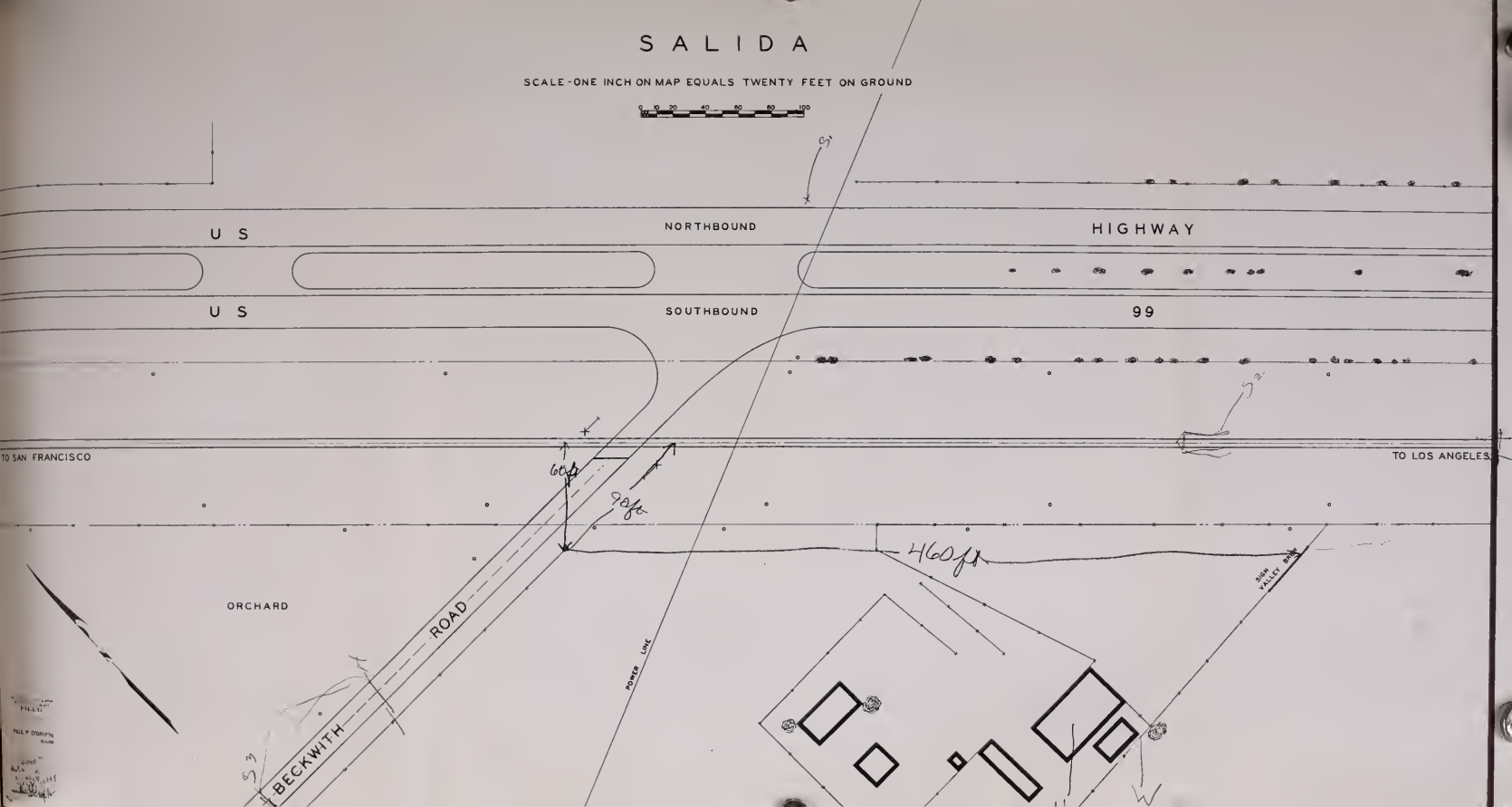
9. The father. In favor of his widow and children, including the driver John.

SALIDA

SCALE - ONE INCH ON MAP EQUALS ONE HUNDRED FEET ON GROUND

0 50 100 200 300 400




SALIDA
SCALE - ONE INCH ON MAP EQUALS TWENTY FEET ON GROUND
U S
NORTHBOUND
HIGHWAY
U S
SOUTHBOUND
99
TO SAN FRANCISCO
TO LOS ANGELES
60ft
460ft
ORCHARD
ROAD
BECKWITH
POWER LINE
SIGN VALLEY BANK

September 22, 1948 (R. 66). On October 21, 1948 appellant filed its notice of appeal and designation of record (R. 70) and its bond was approved and filed.

The jurisdiction of the District Court is based on 28 U.S.C.A. §71, as in effect as amended. The jurisdiction of this Court is sustained by 28 U.S.C.A. §1291, §1294, §2107 and the Federal Rules of Civil Procedure, Rule 73.

II.

STATEMENT OF THE CASE

North of Modesto, the Southern Pacific private right of way runs generally northwesterly parallel to and west of Highway 99, which is a divided highway at that point. About two miles north of Modesto, a local two lane county road, Beckwith Road, comes into Highway 99 from the northwest at an angle of approximately 45° and immediately before joining Highway 99 crosses the Southern Pacific right of way and the single main line track parallel to Highway 99.

The crossing is a typical open country railroad crossing at grade. There were the usual standard crossbuck warning signs. A conception of the locality, position of the road, the railroad tracks, Highway 99, location of fixed objects and the like can best be had from two diagrams, Court's Exhibits 1 and 2.[10] These diagrams are reproduced herein for convenience of the Court. In reproducing them, a reduction in size was made. Various dimensions, however, are shown on the diagrams. In addition, distances can be scaled from the diagrams, for though the

10. Introduced as the Court's Exhibits 1 and 2 on Defendant's opening statement (R. 89, 90). They were prepared by an engineer from a survey and are accurately drawn to scale.

scale on the Exhibits will not apply, the graphic scales upon each diagram were, of course, reduced proportionately, and in the same ratio as the diagram as a whole.

Beckwith Road, at the point of the accident is perfectly straight as it approaches the crossing. Although straight, it does not intersect the tracks at a right angle, but the angle of approach favors the driver's view down the tracks in the direction from which the locomotive was coming. On the approach to the crossing along Beckwith Road, as indicated on the diagrams, there are a reflectorized advance warning sign off the road and a railroad crossing warning sign painted on the pavement (Court's Exhibit 1, R. 122, Def's Ex. A, B).

The view of the driver approaching this track is demonstrated by the pictures in evidence. Defendant's Exhibit I is here reproduced showing the view down the tracks in the direction from which the locomotive was coming.[10a] From a point 60 feet from the tracks on the perpendicular (during which an automobile must travel 90 feet)[11] the view down the tracks is open and free both ways. Farther back there is a low row of grape vines, but there was no evidence and there was no claim that they interfered with the view at the eye level of a driver of an automobile. A train is clearly seen in the photograph reproduced here.

10a. The photograph reproduced here is Defendant's Exhibit I taken on Beckwith Road, 75 feet west of the tracks and looking in the direction from which the engine was coming (R. 128-129). It shows the driver's view at that point.

11. See Court's Exhibit 2. Since the road approaches the track at an angle the distance along the road to the track (90 ft.) is more than the perpendicular distance (60 ft.). The Souza automobile travelled the greater distance (90 ft.) with a clear, unobstructed view.


RAIL
ROAD
CROSSING

There was nothing to prevent its being seen, if one looked, from Beckwith Road.

All three occupants of the Souza automobile were familiar with Beckwith Road and its approach to and the railroad crossing.[12] They all lived on a ranch northwest of Modesto, about three miles from the crossing (R. 81, 98, 99).

John Souza, the driver, was 19 at the time of the accident (R. 98). He had acquired the 1941 Ford Coupe, which he was driving at the time of the accident, about seven months before but had neither a driver's license nor an instruction permit at the time of the accident (R. 116-117). This was known to his father and brother Edward (R. 117).

At the time of the accident John and his father and brother Edward were going to look at a ranch (R. 100) which John had seen advertised (R. 118), and which was thought suitable to stock with beef and in regard to which John wanted their help, advice and approval (R. 101, 118, 119, 120, 121, 122). They were talking over the ranch on the way to it just before the accident (but not at the time of the accident). All three were in the front seat, John was driving, his brother Edward sat in the middle and his father sat on the extreme right (R. 100). The father's consent to his minor son's driving was not disputed.[13]

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12. There never was an issue on this. Plaintiffs' attorney conceded in his opening statement that "* * * young Mr. Souza was very familiar with this particular crossing. * * *" (R. 81).

13. The father was riding with his son. Plaintiffs' opening statement concedes that the Vehicle Code imputes negligence, if any, to the person allowing him to drive "so in that situation, from the standpoint of Mrs. Josephine Souza and the standpoint of her children, that is, the minor children, as well as the adult children, and from the standpoint of John Martin Souza, the same law applies" (R. 77).

John testified that he drove along Beckwith Road about 35 to 40 miles per hour but slowed down about 100 to 200 feet from the crossing (R. 102). At 60 feet from the tracks, with no obstruction to his view, he says he was going about 15 miles per hour (R. 103). He testified that he stopped about 20 feet from the crossing (R 1.03), looked both ways and didn't look again to his right until he was on the tracks at which time he saw a locomotive 50 to 75 feet away (R. 104). There was evidence that he didn't stop before crossing the tracks (R. 334, 335).

John testified he heard no whistle or bell or noise of the engine before seeing it (R. 109). The window of the car on the right hand side was rolled up. There was evidence that the whistle and bell were sounded and evidence that they were not. There was no evidence that the train made no noise. On the contrary, the attention of two independent witnesses, across the highway, was attracted to the engine before the accident by noise it was making as it came down the tracks (R. 333, 334, 330, 349, 323). One of them described it as rattling of wheels and side rod plunger pounding (R. 333, 349). John didn't even hear the engine when he was on the tracks when he looked up to see the engine only 50-75 feet away (R. 111).

John claimed that he could see only 600 feet down the track (R. 104), because of a haze or mist. The sun was up, had been up for from three to four hours. There was testimony that it was a clear day. One of plaintiff's witnesses testified that he saw the accident from a point at least 1,162 feet away[14] and saw the engine continue on an addi-

14. Witness Oran Davis testified he was at the intersection of Dale Road and Highway 99 when he saw the automobile

tional 1,000 feet farther from him, so that his range of visibility was no less than 2,162 feet (R. 169, 170, 186, 187).

The engine involved was a passenger engine, running light or without cars. The front of the locomotive had been painted a silver color (Plaintiff's Exhibit 10, R. 428-429) as an added precaution for motorists to make it visible at a greater distance. Its speed was estimated by eye witnesses at 25 to 40 and at 60 miles per hour. The highest speed attributed to it, by one of plaintiff's witnesses, was 65 to 70 miles per hour.

In the collision, John received minor injuries, his father was instantly killed, and his brother Edward received injuries from which he later died.

III.

SUMMARY OF POINTS TO BE DISCUSSED

We propose to argue:

1. Under the evidence, John Souza, the driver, was guilty of contributory negligence as matter of law, in driving his automobile onto the railroad tracks in plain view of an approaching locomotive, which on his testimony could have been seen by him for the last 600 feet of its approach, but was not seen by him until it was 50 to 75 feet from him. The court erred in submitting John's case to the jury.

2. The negligence of John Souza, the driver, is imputed as matter of law to his father by reason of §352(b) of the Vehicle Code of the State of California. The court erred in submitting the father's case to the jury. Even if

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approaching the crossing and saw the locomotive. The distance along Highway 99 from Dale Road to Beckwith Road was measured at 1162 feet (R. 274-275). It would be further to the scene of the accident.

we are wrong in this it still remains the court erred in the manner in which this issue was submitted to the jury, in permitting the jury to determine as a fact whether the Vehicle Code applied to this case. It applied as a matter of law and the preliminary question of fact submitted to the jury was not in dispute.

3. There was evidence from which the jury could have found that all three occupants of the automobile were engaged in a joint venture and the court erred in refusing to submit that issue and the question of agency as between them to the jury.

4. The court erred in the granting of certain of plaintiffs' instructions and in the refusal of certain of defendant's instructions and by doing so the jury was not properly instructed, to the prejudice of appellant, as to the issues which were submitted to the jury.

5. The court erred in denying appellant's motions after judgment.

IV.

SPECIFICATION OF ERRORS

1. The court erred in denying appellant's motion for a directed verdict as to the case of and complaint on behalf of John Martin Souza (R. 359, 360).

2. The court erred in denying appellant's motion for a judgment notwithstanding the verdict as to the case of and complaint on behalf of John Martin Souza (R. 59-61, 66).

3. The court erred in denying appellant's motion for a directed verdict as to the case of and complaint on behalf of the death of Antonio Azevedo Souza (R. 359, 360).

4. The court erred in denying appellant's motion for a judgment notwithstanding the verdict as to the case of

and complaint on behalf of the death of Antonio Azevedo Souza (R. 59-61, 66).

The court erred in its charge to the jury as follows:

5. "I respectfully object to the modification of defendant's proposed instruction No. 37, which left to the jury the question of the consent of the father to the driver of the automobile as a matter of fact, instead of instructing that that is a matter of law" (R. 397). Defendant's proposed instruction No. 37 is as follows:

> "Defense Instruction No. 37
>
> By Section 352(b) of the California Vehicle Code, in effect at the time of this accident, it is provided that any negligence of a minor, whether licensed or not under that code in driving a motor vehicle upon a highway with the express or implied permission of his parents, shall be imputed to such parents for all purposes of civil damages. Accordingly, if in this case there was any negligence on the part of the driver, John Martin Souza, which was a proximate cause of the accident and death of his father Antonio Azevedo Souza, such negligence is to be imputed to the father with the same effect as though the father himself had been guilty of negligence." (R. 446, 447)

The Court charged: "By Section 352(b) of the California Vehicle Code, in effect at the time of this accident, it is provided that any negligence of a minor whether licensed or not under that code in driving a motor vehicle upon a highway with the express or implied permission of his parents shall be imputed to such parents for all purposes of civil damages. Accordingly, if you find from a preponderance of the evidence that John Martin Souza,

a minor, drove the automobile with the permission, express or implied, of his parents and that there was negligence on his part which was a proximate cause of the accident and of the death of his father, Antonio Azevedo Souza, such negligence is to be imputed to the father with the same effect as though the father himself had been guilty of negligence'' (R. 386, 387).

6. ''I respectfully except to the giving of Plaintiff's Proposed Instruction No. 9, in substance and in effect stating to the jury that the plaintiffs were entitled to anticipate that the defendant would exercise care in the operation of its locomotive, and in connection with that I respectfully object and except to the denial of the Defense Proposed Instruction No. 27, which would have told the jury that the operators of the train were entitled to assume that any traveler traveling upon the highway would perform duties that the laws of the State impose upon him'' (R. 397, 398). The Plaintiff's Proposed Instruction No. 9 was read by the court as follows:

> ''You are instructed that a person in the exercise of ordinary care and caution, himself, in approaching a railroad track, has a right to anticipate until his faculties inform him to the contrary, that those in charge of a railroad train which might be approaching such crossing would exercise ordinary care and caution, as required by law.'' (R. 380)

Defendant's Proposed Instruction No. 27 is as follows:

> ''Defense Instruction No. 27
>
> In considering the conduct of those in charge of the railroad locomotive and in passing on the claim that defendant was guilty of negligence in operating and

propelling it, you will bear in mind that the engineman, until put on notice to the contrary, had the right to assume and presume that any person operating an automobile toward or onto the railroad track would perform the duty which the law of this State imposes upon the driver of such an automobile and, in the reasonable exercise of his faculties of observation and caution, would not attempt to cross the track in dangerous proximity to an approaching railroad locomotive if the same were plainly open to view so that collision with the locomotive could be avoided if the automobile driver exercised reasonable care and complied with the duties imposed upon him by law. Accordingly, in considering this case, you must consider the duties which the law imposed upon John Martin Souza, the driver of the automobile, in the operation of that automobile, as he approached the railroad track, not only from the point of view of determining whether there was any negligence on his part, but also from the point of view of the bearing which the duties he was required to perform, and which in the absence of notice to the contrary the enginemen were entitled to assume he would perform, may have on the claim of negligence on the part of defendant.'' (R. 445, 446)

7. ''We respectfully object and except to the failure to submit the question of joint enterprise to the jury as a question of fact, and the question of agency as a question of fact as between the two brothers'' (R. 398). Defendant requested instructions as follows:

''Defense Instruction No. 38

If you find that at the time of this accident John Martin Souza and his brother, Edward Anthony

Souza, in the use and operation of the automobile were engaged in a joint venture or enterprise, and in the use of the automobile were engaged in a common undertaking in which they had a community of interest and in respect of which each exercised or had the right to exercise an equal or joint control and direction and there was, in the use of the automobile, a mutual agency such that the driver, although he was the owner of the automobile, was operating it not alone for his own benefit, but as well for the benefit of his brother and as his agent, then, any negligence on the part of the brother John Martin Souza, who was driving the automobile, is to be imputed to the deceased brother Edward Anthony Souza with the same legal effect as though the deceased brother himself had been guilty of negligence'' (R. 447).

''Defense Instruction No. 39

Even if you should find that the father, Antonio Azevedo Souza, was not himself negligent or that the deceased brother, Edward Anthony Souza, was not himself negligent, still, if the brother and son who was driving, John Martin Souza, was guilty of contributory negligence in the operation of the automobile and under the facts of the case and the instructions, his negligence is to be imputed to either the deceased father or the deceased brother there can be no recovery on account of the death of the person to whom such negligence is to be imputed and the negligence of the driver will have the same legal effect to bar any recovery for death as though the person to whom such negligence is imputed had himself been guilty of contributory negligence'' (R. 447, 448).

8. "We respectfully object and except to the failure to give Defense Proposed Instruction No. 56, which would have told the jury that if the circumstances were such that the plaintiff must have seen, the driver must have seen an approaching locomotive—

[The court interrupted, followed by discussion.]

* * * * * * *

We object and except to the failure to give Defendant's Proposed Instruction No. 56 which would have told them if the approach of the locomotive could have been learned, he did not look or failed to and crossed in front of it" (R. 398, 399). Said requested instruction No. 56 is as follows:

"Defense Instruction No. 56

> If the driver of the automobile, on the occasion of the accident complained of, and in view of the physical facts then existing at the scene of the accident, had he exercised ordinary care, must have learned of the approach of the locomotive in time to have avoided collision with it, by using ordinary care, then the very fact that the automobile collided with the engine raises a presumption that he did not take the required precautions and did not look or listen (*Loftus v. Ry.,* 166 Cal. 464; *Koster v. S. P.,* 207 Cal. 753), or that, having looked and listened, he endeavored to cross immediately in front of the approaching train, and in either of such events, if so you find, his conduct would constitute negligence proximately contributing to the accident" (R. 448).

9. "We respectfully except and object to the failure to give Defense Proposed Instruction No. 58, which in substance and effect states that if the circumstances were

such that the driver, by looking, must have seen the locomotive in time to have avoided it, any testimony that he looked and did not see may be disregarded by the jury" (R. 400). Said instruction No. 58 is as follows:

"Defense Instruction No. 58

Neither the court nor the jury is bound by the mere declaration of a witness, no matter how improbable, incredible, or impossible that declaration may be. The court or jury is only bound by swearing credibility [credibly], that is to say, credible swearing is all that is to conclude either the court or the jury in its judgment. It is not enough for a witness to say that he looked with unseeing eyes or listened with unhearing ears. If the established facts and conditions, including the physical surroundings at the scene of the accident, were such that before the accident, and before leaving a place of safety, the driver John Martin Souza, if he had looked in the direction from which the locomotive came, must have seen it in time to have avoided being struck by it, by exercise of reasonable care, and must have seen it while he was in a place of safety, then I instruct you that any testimony, if such there has been, that in such circumstances he did look, but did not see the locomotive, may be disregarded by you" (R. 449).

10. "We respectfully except and object to the failure to give Defense Proposed Instruction No. 58-A, which would have told the jury the mere fact that two other persons were in the car did not relieve them or any of them from the duty of exercising ordinary care" (R. 400). Said Proposed Instruction No. 58-A is as follows:

"Defense Instruction No. 58-A

The mere fact that Antonio Azevedo Souza and Edward Anthony Souza were not physically driving and operating the automobile did not relieve them or either of them from the duty of exercising reasonable care in respect of the operation of the automobile, and each as to his own safety. To the contrary, each was at all times under a duty to exercise such care" (R. 449, 450).

V.

ARGUMENT

A. The Rights and Duties of the Railroad and Highway Traveler at a Grade Crossing Are Settled and Rules Fixing Standard of Care Required of Highway Traveler Are Established as Matter of Law.

The California courts have repeatedly recognized that steam railroad grade crossing accidents belong to a class "of cases which have appeared so frequently that a definite standard of care required in particular circumstances has been laid down by the courts, and in each of such classes there has been developed a rule and failure to comply with such standard is, as matter of law, negligence. Thus, it is well settled that the 'railroad track of a steam railroad must itself be regarded as a sign of danger, and one intending to cross must avail himself of every opportunity to look and to listen for approaching trains'." (*Hamlin v. P. E. Ry. Co.,* 150 Cal. 776, 778, 89 P. 1109.[15])

15. For other cases recognizing that the rules for steam railroad crossings have been crystallized and standardized see: *Herbert v. S. P. Co.,* 121 Cal. 227, 53 P. 651; *Scott v. San Bernardino etc. Co.,* 152 Cal. 604, 93 P. 677; *Green v. L. A. etc. Ry. Co.,* 143 Cal. 31, 35, 76 P. 719; *Calif. Rendering Co. v. P. E. Ry. Co.,* 205 Cal. 73, 76, 269 P. 922; *Koster v. S. P. Co.,* 207 Cal. 753, 766, 279 P. 788.

That the steam railroad cases belong to a particular class in which the rules have been crystallized and standardized is shown by those cases which have recognized and applied the distinction between such cases and street car cases where an interurban line was involved and have cited the railroad cases to the point that in the steam railroad case the traveler must exercise greater vigilance and is held to stricter accountability and the railroad has greater privilege of through and continuous motion than is the case with street car traffic (*Lund v. P. E. Ry. Co.*, 25 Cal. 2d 287, 153 P.2d 705[16]; *Hamlin v. P. E. Ry. Co.*,[17] above; *Kramm v. Stockton etc. Co.*, 3 Cal. App. 606, 614, 86 P. 738 (hr. den.);[18] *Riney v. P. E. Ry. Co.*, 45 Cal. App. 145, 148, 187 P. 50).

The railroad has the right of way. It is the duty of the traveler to "stop and look and listen for such approach-

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16. This case is typical of the type of case in which this question is most frequently discussed. It was the case of an interurban electric car. In such cases the courts frequently have had occasion to notice that the applicable rules, where operation is in the open country or on a private right of way in the city, are those of the steam railroad cases. Some of these cases are cited in the *Lund Case*. See in addition *N. Y. etc. Co. v. U. R. R.*, 191 Cal. 96, 100, 215 P. 72; *L. A. T. Co. v. Conneally*, 136 Fed. 104 (C.C.A. 9); *Rowe v. So. Cal. Ry. Co.*, 4 Cal. App. 1, 5, 87 P. 220; *Billig v. S. P. Co.*, 192 Cal. 357, 362, 219 P. 992; *Calif. Rendering Co. v. P. E. Ry. Co.*, 205 Cal. 73, 76, 269 P. 922; *Runnels v. U. R. R.*, 175 Cal. 528, 531, 166 P. 18 (noticing particularly that the street car rules are not as strict as the steam railroad rules); *Babcock v. P. G. & E. Co.*, 120 Cal. App. 218, 224, 7 P.2d 736 (hr. den.). This listing is not exhaustive.

17. Street cars and steam railroads differ "materially."

18. It was said that "the courts recognize a distinction between cases of injuries by street railroads and cases of injuries by 'ordinary steam railroads'" and that "the question of what is ordinary prudence is widely different in the two cases."

ing trains or cars, and to yield the right-of-way to such cars or trains." (*Billig v. S. P. Co.,* 192 Cal. 357, 219 P. 992; *Koster v. S. P. Co.,* 207 Cal. 753, 762, 279 P. 788; *Green v. L. A. etc. Ry. Co.,* 143 Cal. 31, 46, 76 P. 719;[19] *N. Y. etc. Co. v. U. R. R.,* 191 Cal. 96, 215 P. 72).

"The railroad track of a steam railroad must itself be regarded as a sign of danger, and one intending to cross must avail himself of every opportunity to look and listen for the approaching train." (*Herbert v. S. P. Co.,* 121 Cal. 227, 53 P. 651.[20]) The track "is itself a warning * * * that it is not safe to walk upon it, or near enough to it to be struck by a passing train, without the exercise of constant vigilance" (*Holmes v. S. P. etc. Co.,* 97 Cal. 161, 31 P. 834[21]). In a case where the traveler was crossing a series of tracks Judge Wilbur said:

> "The railroad track itself is a sign of danger to be heeded at the peril of the traveler on the intersecting

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19. This is a pedestrian case. Some of this language is quoted above at pp. 21 et seq. It was stated that the rule laid down and approved by the authorities is "that it is the duty of the highway traveler to stop and allow the train to pass."

20. The court adds that "if, taking these precautions, he would have seen or heard the approaching train, the very fact of injury will raise a presumption that he did not take the required precautions." And cf. *Levin v. Brown,* 81 C.A. 2d 913, 185 P.2d 329.

21. The following are a few of the legion of cases for this proposition: *Green v. S. P. Co.,* 132 Cal. 254, 259, 64 P. 255; *Young v. P. E. Ry. Co.,* 208 Cal. 568, 577, 283 P. 61; *Parker v. S. P. Co.,* 204 Cal. 609, 269 P. 622; *Koster v. S. P. Co.,* 207 Cal. 753, 764, 279 P. 788; *Hutson v. So. Cal. Ry. Co.,* 150 Cal. 701, 89 P. 1093; *Loftus v. P. E. Ry. Co.,* 166 Cal. 464, 137 P. 34; *Crissinger v. S. P. Co.,* 169 Cal. 619, 149 P. 175; *Griffin v. S. P. etc. Co.,* 170 Cal. 772, 151 P. 282.

highway. This rule is applicable to each track. * * * The railroad track was as much a warning sign as the crossing sign or wig-wag, and as readily visible to one advancing slowly toward the track * * *.''

S. P. Co. v. Day, 38 F.2d 958 (C.C.A. 9).

In *Koster v. Southern Pacific Company,* 207 Cal. 753, 279 P. 788, the Supreme Court of the State of California made it clear that California courts were in exact accord with the rule laid down by Mr. Justice Holmes of the United States Supreme Court in *Baltimore & Ohio Railway v. Goodman,* 275 U.S. 66, 72 L.Ed. 167, 48 Sup. Ct. Rep. 24. The opinion of the *Koster* case sets forth that portion of Justice Holmes' opinion that is the classic statement of the stop, look and listen rule. Beginning at page 762 (page 792, 279 P.), the court states:

''The rule prescribing the quantum of caution that should be observed by persons crossing railroad tracks has been many times stated by this court without material deviation from the standard laid down in the case last above cited, written by Mr. Justice Holmes of the United States Supreme Court. The principle of law which governs that case is, in some respects, peculiarly applicable to the instant case. It is there said:

'' 'Goodman was driving an automobile truck in an easterly direction and was killed by a train running southwesterly across the road at a rate of not less than 60 miles an hour. The line was straight, but it is said by the respondent that Goodman ''had no practical view'' beyond a section house 243 feet north of the crossing until he was about 20 feet from the first rail, or, as the respondent argues, 12 feet from danger, and that then the engine was still

obscured by the section house. He had been driving at the rate of 10 or 12 miles an hour, but had cut down his rate to 5 or 6 miles at about 40 feet from the crossing. It is thought that there was an emergency in which, so far as appears, Goodman did all that he could.

"'We do not go into further details as to Goodman's precise situation, beyond mentioning that it was daylight and that he was familiar with the crossing, for it appears to us plain that nothing is suggested by the evidence to relieve Goodman from responsibility for his own death. When a man goes upon a railroad track he knows that he goes to a place where he will be killed if a train comes upon him before he is clear of the track. He knows that he must stop for the train, not the train stop for him. In such circumstances it seems to us that if a driver cannot be sure otherwise whether a train is dangerously near he must stop and get out of his vehicle, although obviously he will not often be required to do more than to stop and look. It seems to us that if he relies upon not hearing the train or any signal and takes no further precaution he does so at his own risk. If at the last moment Goodman found himself in an emergency it was his own fault that he did not reduce his speed earlier or come to a stop. It is true, as said in *Flannelly v. Delaware & H. Co.,* 225 U.S. 597, 603 [44 L.R.A. (N.S.) 154, 56 L.Ed. 1221, 1222, 32 Sup. Ct. Rep. 783], that the question of due care very generally is left to the jury. But we are dealing with a standard of conduct, and when the standard is clear it should be laid down once for all by the courts. See *Southern P. Co. v. Berkshire,* 254 U.S. 415, 419 [65 L.Ed. 335, 337, 338, 41 Sup. Ct. Rep. 162]'."

One sentence of Justice Holmes' opinion is of particular importance here:

> "'It seems to us that if he relies upon not hearing the train or any signal and takes no further precaution he does so at his own risk'."

Nor have the cases left it indefinite as to what must be done by way of looking and listening. The rule for the traveler is that "the imperative duty is cast upon him to listen carefully and to look carefully at the most available and convenient distance from the track from which an observation of it can be made, and when the act of listening and looking may be reasonably effective" (*Martin v. S. P. Co.,* 150 Cal. 124, 88 P. 701). If he does not look, or looks heedlessly, he is negligent (*California Rendering Co. v. P. E. Ry. Co.,* 205 Cal. 73, 269 P. 922). He is negligent if it can be said of him that he "looked with unseeing eyes and listened with unhearing ears" (*Zibble v. S. P. Co.,* 160 Cal. 237, 116 P. 513).

The duty is "to look for approaching cars at such point and in such manner as would enable him to determine if he could proceed in safety" (*Cal. Rendering Co. v. P. E. Ry. Co.,* 205 Cal. 73, 269 P. 922). To this end, the place selected for looking must be one where looking is effective (*Green v. So. Cal. Ry. Co.,* 138 Cal. 1, 70 P. 926; *Green v. L. A. etc. Ry. Co.,* 143 Cal. 31, 76 P. 719; *Pacheco v. S. P. Co.,* 129 Cal. App. 610, 19 P.2d 251, (holding that stopping for an arterial stop sign at a point where the traveler cannot see does not satisfy the railroad crossing rule)).

> "It is the duty of a traveler on a highway approaching a railroad crossing to use ordinary care in selecting a time and place to look and listen for coming trains. He should stop for the purpose of making

such observation when necessary. It is his duty to use all of his faculties, and it is not enough if he merely listens, believing that the people in charge of any approaching engine will ring a bell or sound a whistle. * * * Stopping 35 feet from the crossing and trusting to his sense of hearing, when he might have obtained a clear view of the track by moving 18 feet and a few inches nearer, clearly indicates negligence. * * * A person approaching a railway track which is itself a warning of danger must take advantage of every reasonable opportunity to look and listen."

Griffin v. San Pedro etc. R. R. Co., 170 Cal. 772, 151 P. 282.

Looking at a point remote in time and place from the attempt to cross the track will not do. The Court in *Green v. L. A. etc. Co.,* 143 Cal. 31, 76 P. 719, used the following language in pointing out the reason for this:

"If risk is inherent in a continuing state of things, the duty to exercise reasonable care is a continuing obligation. This at least must be true, that a man is negligent who attempts to drive across a railroad line after listening and looking only once toward a quarter from which a train may approach, if these acts of attention and observation are performed when the observer is so far from the crossing that before he will reach it a train coming from that quarter, and open to his further attention and observation, has time to advance so as to endanger him. * * * The defect was that, though he exercised care at first, he did not continue to be careful, but became inattentive to his surroundings before he reached a place of safety. * * *

"It is equally clear, on principle and authority, that this duty must be performed at such time and

place, with reference to the particular situation in each case, as will enable the traveler to accomplish the purpose the law has in view in its imposition upon him. He must stop so near to the track, and his survey by sight and sound must so immediately precede his effort to cross over it, as to preclude the injection of an element of danger from approaching trains into the situation between the time he stopped, looked, and listened, and his attempt to proceed across the tracks."

The danger being one from a moving train, the traveler must "take advantage of every reasonable opportunity to look and listen" (*Chrissinger v. S. P. Co.,* 169 Cal. 619, 149 P. 175). "In fact, the law requires a person to keep looking where they are crossing a railroad track" (*Griswold v. Ry. Co.,* 45 Cal. App. 81, 187 P. 65). "The duty is constant because the danger is incessant" (*Robinson v. Oregon-W. etc. Co.,* 90 Ore. 490, 176, P. 594. Compare, also, the *Herbert Case,* and *Riney v. Ry. Co.,* 45 Cal. App. 145, 187 P. 50; *Vilhauer v. P. E. Ry. Co.,* 118 Cal. App. 240, 4 P.2d 960).

Looking at a remote point, particularly where at a nearer point an unobstructed view can be had, will not satisfy the rule.

Pacheco v. S. P. Co., 129 Cal. App. 610, 19 P.2d 251;

Green v. Ry. Co., 138 Cal. 1, 70 P. 926;

Green v. Ry. Co., 143 Cal. 31, 76 P. 719;

Calif. Rendering Co. v. P. E. Ry. Co., 205 Cal. 73, 269 P. 922;

Koster v. S. P. Co., 207 Cal. 753, 279 P. 788;

Stephenson v. N. W. P. R. Co., 208 Cal. 749, 284 P. 913;

Shannon v. N. W. P. R. Co., 209 Cal. 303, 287 P. 91;
Young v. S. P. Co., 182 Cal. 369, 190 P. 36; 189 Cal. 746, 210 P. 259.

"Where the view is obstructed he must place himself in a position where he can use his faculties of observation to advantage" (*Thompson v. S. P. Co.,* 31 Cal. App. 567, 161 P. 21; *Pepper v. S. P. Co.,* 105 Cal. 389, 401, 38 P. 974; *Young v. S. P. Co.,* 182 Cal. 369, 190 P. 36). Too, he must use added care in listening.

Herbert v. S. P. Co., 121 Cal. 227, 53 P. 651;
Pepper v. S. P. Co., 105 Cal. 389, 38 P. 974;
Koster v. S. P. Co., 207 Cal. 735, 767, 279 P. 788;
Flemming v. W. P. R. R. Co., 49 Cal. 253; not cited in Pacific;
Green v. S. P. Co., 132 Cal. 254, 259, 64 P. 255.

It is so obvious that the thing to be listened for and looked for is an approaching train that it would hardly seem necessary to waste words saying so. Yet the courts have taken occasion to point this out (*Loftus v. P. E. Ry. Co.,* 166 Cal. 464, 137 P. 34; *Murray v. S. P. Co.,* 177 Cal. 1, 169 P. 675; *Calif. Rendering Co. v. P. E. Ry. Co.,* 205 Cal. 73, 269 P. 922). It seems equally obvious that looking anywhere around the countryside will not satisfy the rule. The looking must be done toward a point where the train or cars may be. There is only one such point—that is along the track—down the track in the direction from which danger may come.

Not only must the looking be directed at the line of the railroad, and be for approaching engines or cars, but it must be efficient looking. It is the traveler's duty to look "in such manner as would enable him to determine if he

could proceed in safety'' (*Calif. Rendering Co. v. P. E. Ry. Co.,* 205 Cal. 73, 269 P. 922). When the view is ''unobstructed it is the duty of the motorist to see what can be seen'' (*Parker v. S. P. Co.,* 204 Cal. 609, 269 P. 622). The law presumes that he does (*Young v. S. P. Co.,* 189 Cal. 746, 210 P. 259; *Billig v. S. P. Co.,* 192 Cal. 357, 219 P. 992; *Cate v. Fresno T. Co.,* 213 Cal. 190, 2 P.2d 364).

Where the view of a crossing is unobstructed and the approaching train or car is, consequently, in plain sight, the inference of negligence is inescapable. If the traveler does not look he is guilty of negligence. If he does look and sees, and attempts to cross the path of the approaching train he is guilty of negligence. If he looks, but looks heedlessly, and does not see the train, he is guilty of negligence.

In *Calif. Rendering Co. v. P. E. Ry. Co.,* 205 Cal. 73, 269 P. 922, the driver, while covering a distance of 32 feet, had an unobstructed view of the approaching car. The Court said:

> **"During this time he either failed to look to the right at all, or if he did so, he must have looked heedlessly. In either case his negligence was apparent. He cannot be cleared of the charge of negligence by a showing that he stopped the truck on a line with the trees and there looked to the right."**

In *N. Y. etc. Co. v. U. R. R.,* 191 Cal. 96, 215 P. 72, the Court said:

> "It is the rule in this state that where the physical facts shown by the undisputed evidence raised the inevitable inference that a person approaching a railroad crossing did not look or listen, or that, having looked and listened, he endeavored to cross immediately in front of a rapidly approaching train which

was plainly open to his view, he is, as matter of law, guilty of contributory negligence."

Accord:

Heroux v. A. T. & S. F. Ry. Co., 28 C.A.2d 401, 82 P.2d 738;

Martz v. Ry. Co., 31 Cal. App. 592, 161 P. 16;

Jones v. S. P. Co., 34 Cal. App. 629 (hr. den.), 168 P. 586;

Cate v. Fresno Traction Co., 213 Cal. 190, 2 P.2d 364;

Glascock v. R. R. Co., 73 Cal. 137, 14 P. 518;

Larrabee v. W. P. Ry. Co., 173 Cal. 743, 161 P. 750;

Chic. etc. Co. v. Houston, 95 U.S. 697, 24 L.ed. 542;

Northern P. R. Co. v. Freeman, 174 U.S. 379, 43 L.ed. 1014;

Atchison etc. Co. v. McNulty, 285 F.97 (C.C.A. 8) cert. den. 262 U.S. 746, 67 L.ed. 1212.

If the traveler, "taking these precautions, would have seen or heard the approaching train, the very fact he was injured will raise a presumption that he did not take the required precautions."

Herbert v. S. P. Co., 121 Cal. 227, 53 P. 651;

Green v. S. P. Co., 132 Cal. 254, 64 P. 255;

Bilton v. S. P. Co., 148 Cal. 443, 83 P. 440;

Koster v. S. P. Co., 207 Cal. 753, 279 P. 788;

Scott v. San Bernardino etc. Co., 152 Cal. 604, 93 P. 677;

Hutson v. Ry. Co., 150 Cal. 701, 89 P. 1093;

Griffin v. S. P. etc. Co., 170 Cal. 772, 151 P. 282;

Larrabee v. W. P. Ry. Co., 173 Cal. 743, 161 P. 750.

"A collision at a railroad crossing is *prima facie* evidence of negligence on the part of traveler."

Robbins v. S. P. Co., 102 Cal. App. 744, 752, 283 P. 850.

"When it appears that if proper precautions were taken they could not have failed to prove effectual, the court has no right to assume, especially in the face of all the oral testimony, that such precautions were taken."

Northern P. R. Co. v. Freeman, 174 U.S. 379, 43 L.ed. 1014.

In viewing testimony the rule is that:

"If the established facts and conditions are such as to make it plain that plaintiff, looking and listening, must have seen or heard an approaching train, his testimony that he looked and listened, but did not see or hear, is not enough to support a verdict in his favor."

Loftus v. Ry. Co., 166 Cal. 464, 137 P. 34;
Chrissinger v. S. P. Co., 169 Cal. 619, 149 P. 175;
Zibbell v. S. P. Co., 160 Cal. 237, 116 P. 513;
Jones v. S. P. Co., 34 Cal. App. 629 (hr. den.), 168 P. 586;
Hughes v. Atchison etc. Co., 121 Cal. App. 271 (hr. den.), 8 P.2d 853;
O'Neill v. Reading Co., 296 Pa. 319, 145 Atl. 840;
Penn. R. Co. v. Yingling, 148 Md. 169, 129 Atl. 36;
U. P. R. R. Co. v. Rosewater, 157 F. 168 (C.C.A. 8);
Atchison etc. Co. v. McNulty, 285 F. 97 (C.C.A. 8), cert. den. 262 U.S. 746, 67 L.ed. 1212;
McNabb v. Va. Ry. Co., 55 F.2d 137 (C.C.A. 4).

Lastly, it has been argued that but for the negligence of the defendant railroad company, as to speed, in not giving signals, or in some other respect, the accident would not have happened in spite of plaintiff's negligence, and that plaintiff's want of attention was in fact induced by the defendant's failure—that the plaintiff relied upon the

defendant to use care and by reason of this reliance was trapped.

This view has been uniformly rejected. The highway traveler may not successfully contend that unusual speed of the train (*Larrabee v. W. P. R. Co.,* 173 Cal. 743, 161 Pac. 750; *Green v. So. Cal. Ry. Co.,* 138 Cal. 1, 70 Pac. 926; *Argo v. S. P. Co.,* 39 C.A.2d 706, 104 Pac.2d 77) or absence of the usual whistle or bell (*Hager v. S. P. Co.,* 98 Cal. 309, 33 Pac. 119; *Herbert v. S. P. Co.,* 121 Cal. 227, 53 Pac. 651; *Hutson v. So. Cal. Ry.,* 150 Cal. 701, 89 Pac. 1093; *Griffin v. San Pedro Ry.,* 170 Cal. 772, 151 Pac. 282; *Hoffart v. S. P. Co.,* 33 C.A.2d 591, 92 Pac.2d 436, **or fog** (*Hoffman v. S. P. Co.,* 84 Cal. App. 337, 258 Pac. 397) or dust (*Flemming v. W. P. R. Co.,* 49 Cal. 253) relieves him of his failure to observe and avoid the approaching train.

B. The Driver of the Automobile, John Martin Souza, Was Guilty of Contributory Negligence as Matter of Law.

Under the cases and rules above, and under the cases presently to be noticed, John Martin Souza, in driving his car onto the crossing, was guilty of contributory negligence as a matter of law.

For the purpose of this argument we shall consider only the evidence produced by the plaintiffs and particularly the testimony of John, the driver.[22]

John was thoroughly familiar with the crossing. He knew where the tracks were (R. 123) and he actually saw

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22. On the trial most of the evidence relied on by plaintiffs was contradicted by independent eye witnesses. Plaintiffs' witnesses were discredited and impeached. Their stories were inconsistent and improbable. Although we consider only the plaintiffs' evidence on this argument, we do so only for the purpose of this argument. Most of it warrants no other consideration.

them as he approached them that morning from a distance of about 100 or 200 feet back (R. 123).[23] The tracks were the main line tracks of the Southern Pacific San Joaquin Valley line from San Francisco to Los Angeles and he knew that trains could be expected at any time. His surroundings, without more, were an imperative warning which he was required to heed. He was required to look and keep looking (see p. 24 above). He could not expect trains to stop for him. It was his duty to stop for them. He knew this.[24]

According to John he drove east on Beckwith Road about 35 to 40 miles per hour but slowed down within 100 to 200 feet[25] of the crossing. During the last 90 feet of his approach to the crossing there was nothing to obstruct his view[26] (see photographs and diagram reproduced herein). He says he slowed down to 15 miles per hour at 60 feet from the crossing and came to a stop 20 feet from the tracks (R. 103). He first looked to his right and then to his left (R. 104). He claimed there was "a sort of haze hanging low and he could not see any more than 200

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23. At another place he gave the distance as about 75 or 100 feet (R. 124).

24. "When a man goes upon a railroad track he knows that he goes to a place where he will be killed if a train comes upon him before he is clear of the track. He knows that he must stop for the train, not the train stop for him." *Koster v. S. P. Co.*, 207 Cal. 753, 762, 279 Pac. 788, 794.

25. At another place he said "200 to 300 feet; maybe less" (R. 137).

26. There was no claim or evidence of any obstruction to view further back (R. 80, 124).

yards[27] down the track'' (R. 104).[28] Testimony produced by plaintiffs, and by which they are bound, established that the visibility at the time of the accident was at least 2,162 feet or more, regardless of the claimed haze.[29] He says he heard no whistle,[30] no bell and no sound of an approaching train.[31] He says he then put the car in low gear and proceeded from a stop up to a speed of 3 to 4 miles per hour at the time of the accident (R. 111, 156). He admits he didn't look down the tracks again until he was astraddle of the tracks when something caused him to look up and

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27. This is on direct examination. The 200 yards was not an inadvertence used to mean feet. On cross examination he used both 200 yards and 600 feet. His attorney fixed it at the same distance in the opening statement. At other places John referred to the visibility as 600 feet (R. 146, 157). The 600 feet was **unimpaired vision down the track**, as brought out by his attorney on redirect examination.

> ''Q. In other words, I want to know **how far down those tracks you had an unimpaired vision.**
>
> A. I would say I could see about 600 feet.'' (R. 157)

28. John repeatedly and positively fixed the visibility down the track at 200 yards or 600 feet, but on cross examination admitted that it was no more than a guess and that he had not fixed the distance by any object (R. 144).

29. Davis, plaintiffs' witness, testified that he saw the accident from a point 1162 feet from the crossing and that he saw the engine come to a stop 1000 feet beyond the crossing (R. 169, 170).

30. Davis, plaintiffs' witness, testified that the train whistled, sounded a ''blast'' just after the engine crossed North Road (R. 168), 3,579.6 feet from Beckwith Road (R. 274). On plaintiffs' case, then, the whistle was blown approximately 30 seconds before the accident. John did not even hear this whistle which was established by his own witness.

31. He also said he heard no noise of the train when he finally did see it only 50 or 75 feet away (R. 111).

he saw a train 50 or 75 feet away (R. 104). He said he did not know what made him look to his right (R. 143, 111).

John's approach to the crossing was at a 45° angle so that as he approached the tracks his car was headed partially in the direction from which the locomotive was coming.[32] Photographs of the locomotive in evidence show it to be a large passenger type engine with the front painted a silver, or aluminum color,[33] to make it more readily seen from a greater distance. Its speed as it approached the crossing was estimated by the plaintiffs' witnesses at 60 miles[34] per hour and 65 to 70 miles per hour.[35] Admittedly, and on the driver's testimony, it could

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32. The locomotive was coming from his right. Stopped, as he claims, 20 feet from the tracks, he was facing half way in the direction from which the locomotive was coming, so that by the slightest turn of his head he could have seen the locomotive within the range of his admitted visibility as the locomotive and his automobile approached each other half-way head on.

33. Inasmuch as this was conceded, it was unnecessary for plaintiffs' witness Davis to testify positively and of his own knowledge as to the color of the front end of the locomotive. The physical facts and his testimony as to his conduct, establish that he never saw the front end of the locomotive.

34. This estimate was by the same Davis. The testimony by Davis as to his conduct and the physical facts appearing from the diagram (Court's Exhibit 1) show that he was in substantial error as to this estimate of speed or mistaken in his testimony as to his own conduct.

35. This estimate was by Johnston, who, at the time of the accident, was the fireman of the locomotive. For the purpose of this argument, his estimate must be accepted. It should be noted, however, that his original report after the accident was contrary to his testimony, and his testimony is contradicted by independent witnesses and by the only other living member of his crew.

be seen at least 600 feet away, yet John did not see it until it was 50 to 75 feet from him.

John's testimony is, then, a statement that he continued to drive a slowly moving automobile from a point 20 feet west of the tracks directly onto the tracks and into the path of a locomotive, visible to him for at least the last 600 feet of its approach to the crossing. His testimony admits that having looked once to his right, he did not look again until he was on the tracks and it was too late to avoid the collision.

Beckwith Road to the west and the railroad track to the south are both straight for a considerable distance, more than a mile. As noted above, Beckwith Road crosses the track at an angle so that the automobile driver approaching from the west has a better view of the tracks to his right than to his left, in fact can look down the track to his right without turning his head.[36] There was no obstruction to his view and no charge or claim of any obstruction was made on the trial.

In such circumstances John could not have avoided seeing the locomotive as it approached the crossing if he had looked. Even at an assumed speed of 70 miles per hour, the greatest speed estimate given by any of plaintiffs' witnesses, the locomotive would require approximately 6 seconds to travel the last 600 feet in plain view of the driver and occupants of the automobile. During this same period of time the automobile would travel at least 27 feet at 3 miles an hour and 36 feet at 4 miles per hour. On John's own testimony the locomotive must have been within his vision before he started from the place where he

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36. See footnote 32.

stopped, and it was in his view constantly as he proceeded from there slowly forward and still in a place of safety until he reached the tracks. This accident can be explained only by one of two alternatives, either he did not look, or if he did, he must have seen the locomotive and carelessly misjudged its speed and proceeded on and attempted to cross in front of it. If he had looked he would have seen the engine visible for at least 600 feet, 200 yards, on his own testimony. It was his duty to look. It was his duty to see (see p. 28 et seq., above).

John says he looked once, while stopped, saw and heard nothing and drove onto the track without ever looking again and seeing the plainly visible train.

The slightest movement of John's eyes would have disclosed the approaching locomotive. He didn't have to turn to look out the side window. His auto was headed half-way head on towards the locomotive. He failed to take the slightest heed for his safety.

Had he been paying the slightest attention he would have looked again as he drove toward the tracks after having stopped, and certainly he would have looked before finally driving on the track. To fail to do this is contributory negligence as a matter of law. The highway traveler may not look once and refuse to look again. His duty is a continuing one, he must look and keep on looking for the danger he knows exists. His duty has been standardized and crystallized into rules of law to be determined by the courts and may not be left to be determined in each case by a jury.

In *California Rendering Co. v. P. E. Ry.*, 205 Cal. 73, 269 Pac. 922, the driver claimed to have stopped 32 feet

from the track, and looked to the east, from which point he could see 300 feet down the track. He then looked west, and seeing nothing started across the track. Like Souza, he did not look again to the east, his right, until one wheel was on the track, when he first saw the train about 300 feet away. A judgment in his favor was reversed, the Supreme Court of California holding him guilty of contributory negligence as matter of law for traveling 32 feet during which time the approaching car was in view and for failing to look to his right at all or looking heedlessly.

In *Stephenson v. Northwestern Pac. R. Co.*, 208 Cal. 749, 284 Pac. 913, the facts are these: Stephenson drove his car up to the track, looked up and down, saw nothing, heard no whistle or bell, so started across the track in low gear at not over 5 or 6 miles an hour. He estimated that when he last looked he could see down the track about 100 feet. Poor visibility was claimed as an excuse for failing to see the train, it being one-half hour before sunset on a cloudy and stormy day.

A judgment for plaintiff was reversed, the Supreme Court of California holding (page 752) (p. 914 of 284 P.): "There seems to be no escape from the conclusion that respondent was negligent in failing to observe the approach of the train under the circumstances."

The Court points out (page 751) (p. 914 of 284 P.):

> "The permanent objects on the ground there show that, after passing the corner of the packing house, one could see down the track in excess of four hundred feet. During the time the last twenty or twenty-five feet was traversed by respondent just prior to the collision, the engine must have been plainly visible

to him if he had looked. Had he seen the danger he could have stopped in safety because traveling in low gear at a slow rate of speed in an automobile in good condition. A train at forty miles an hour would travel not over two hundred feet, while a motorist travels twenty-five feet at five miles per hour."

In *Shannon v. Northwestern Pac. R. R. Co.,* 209 Cal. 303, 287 Pac. 91, a nonsuit was affirmed where plaintiff, after stopping 8 feet from the near track and waiting for an eastbound train to pass on that track, drove his car at from 3 to 5 miles per hour, in third (low) gear from that point to the far track where he was hit by a westbound train. His claims of failure to see the westbound train, traveling at high speed, or of failure of that train to whistle, did not free him of contributory negligence in driving from the stopping place to the collision point, when, as the trial court pointed out (p. 305 of opinion): "And after Mr. Shannon did start up, there is no question at all if he looked down there he could see three or four hundred feet down the track. And going three to five miles and hour he could have stopped, because anywhere along here would have been a place of saefty."

One of the most recent California cases affirming the rule is *Argo v. S. P. Co.,* 39 C.A.2d 706, 104 P.2d 77, in which a nonsuit was reversed for failure to submit the question of "last clear chance" to the jury. The decision, however, holds that the driver was guilty of negligence as matter of law for driving 28 feet at between 5 or 6 miles an hour, or a decreased speed, and the court points out (page 709) (pp. 79-80 of 104 P.2d):

"It has frequently been said in the decisions that the railroad track of a steam railway must itself be

regarded as a sign of danger. The slow rate of speed at which decedent was traveling enabled him to avoid the accident up to the time when he was within a few feet of the railroad track. The negligence of the unfortunate man was therefore continuous up to the time he was practically upon the rails. With the picture presented by the facts of this case it would be idle to attempt to show ordinary care or prudence upon the part of the deceased. In fact, to justify the conduct of decedent, we would be required to do violence to practically every railroad crossing case in the State of California."

If Souza had looked, he must have seen the train. If he did not look, or looked heedlessly, he was negligent (*California Rendering Co. v. P. E. Ry. Co.,* 205 Cal. 73, 269 Pac. 922). If he did look, the law presumes he saw the train (*Young v. S. P. Co.,* 189 Cal. 746, 210 Pac. 259), for one cannot "look with unseeing eyes" (*Zibble v. S. P. Co.,* 160 Cal. 237, 116 Pac. 513).

C. The Contributory Negligence of the Driver John Souza Is Imputed by Law to His Father, Antonio Azevedo Souza.

Under §352(b) of the California Vehicle Code, the negligence of John was imputed to his father, Antonio Azevedo Souza.

California Vehicle Code §352(b) provides in part: "Any negligence * * * of a minor * * * in driving a motor vehicle on a highway with the express or implied permission of the parents * * * of the minor shall be imputed to such parents * * * for all purposes of civil damages * * *."

It was conceded by the plaintiffs that John was a minor at the time of the accident and that he was driving the

car with the consent of his father (R. 77). If John was negligent, the statute applied to bar his father's recovery.

The imputation of negligence to the parent extends to actions in which the rights and obligations of the parent are involved in civil actions for damages and the negligence of the minor may be set up as a defense to an action brought on behalf of the parent or for the parent's death.[36a]

Milgate v. Wraith, 19 C.2d 297, 121 P.2d 10;
Rawlins v. Lory, 44 C.A.2d 20, 111 P.2d 973;
Solloway v. Watts, 58 C.A.2d 595, 137 P.2d 477;
Grover v. Sharp etc. Co., 56 C.A.2d 736, 153 P.2d 83 (hr. den.).

That the driver, John Souza, was guilty of contributory negligence as matter of law has been argued above. If that be so, his contributory negligence as matter of law bars the action brought for his father's death, and the trial court should have directed a verdict for the defendant in his father's case as well as his own.

The trial court refused to direct a verdict and submitted the issue of John's negligence to the jury. Having so decided, he was then required to instruct that under Vehicle Code §352(b), if John was negligent, such negligence would be imputed to his father as a matter of law. There were no other facts on this issue to be determined by the jury.

If John was negligent then, all the facts necessary to make this statute applicable to bar the father's recovery as matter of law were stipulated to or conceded on trial.

36a. See footnote 6 above.

The question was solely one of law and the court should have so instructed.

Defense instruction No. 37 was properly drawn and would have correctly instructed the jury as to the provisions of §352(b) and then advised them that if there was any negligence on the part of John which was a proximate cause of the accident, such negligence was to be imputed to the father under that section. The court modified this instruction and submitted to the jury as a question of fact for them to determine whether John was driving with the consent of his father. Exception was taken to the modification (R. 397).

The trial court's instruction permitted the jury, if they so chose, to refuse to apply the vehicle code section by determining that there was no consent by the father.

There was no such issue. It was conceded at the outset in plaintiffs' opening statement. Plaintiffs' counsel told the jury that there was such a vehicle code provision and that because of that the case brought by Mrs. Antonio Souza and her children was governed by the same rules as the case brought by John Souza (R. 77).

Even without that concession, there was no issue for the jury on the question of consent because the father was riding with his son at the time of the accident and his consent was continued throughout.

The vice of the instruction as modified is that it permitted the jury to determine the preliminary fact which should have been decided by the court as matter of law and which would permit them to find under the court's instruction that the statute did not apply. It did apply as matter of law. The issue submitted was not for the jury.

D. Error in the Giving of Plaintiff's Proposed Instruction No. 9 and in the Refusal of Defendant's Proposed Instruction No. 27.

At the plaintiffs' request, the court instructed the jury as follows:

> "You are instructed that a person in the exercise of ordinary care and caution, himself, in approaching a railroad track, has a right to anticipate until his faculties inform him to the contrary, that those in charge of a railroad train which might be approaching such crossing would exercise ordinary care and caution, as required by law." (R. 380)

The instruction is contrary to law, and improperly instructed the jury on a basic issue of the case. A person approaching a railroad track cannot assume or anticipate that the operators of the railroad equipment will operate it in any particular way or with due care and caution. In *Hutson v. So. Cal. Ry. Co.,* 150 Cal. 701, 89 P. 1093, the court said:

> "It is not the law of this state that a person approaching a railroad crossing is authorized to assume that the persons operating a train will not in any way be negligent in that operation. This doctrine has been asserted in some of the states, but it is opposed to the law as laid down in the decisions of this state and of the Supreme Court of the United States. *Such a rule would abrogate the doctrine of contributory negligence in all such cases,* * * *. The rule is simply this: That a railroad crossing from its very nature, is always a place of danger, and a traveler has no right to omit any of the care which the law demands of him, upon the assumption that care will be exercised in the operation of the train. Says the Circuit Court of Appeals in Erie Ry. Co. v. Kane, 118 F. 234 * * * **'There are instances where as matter of law it is neg-**

ligence not to anticipate negligence in others. As, for instance, it is well settled in the Federal Courts that it is negligence for a highway traveler not to anticipate failure on the part of an engineer to give appropriate signals of approach of his train to a highway crossing. He has no right not to look or listen because he has heard no such signals.' This is in accord with the doctrine of the Supreme Court of the United States as laid down in Railroad Co. v. Houston, 95 U.S. 697, where it is said: 'The failure of the engineer to sound the whistle or ring the bell, if such were the fact, did not relieve the deceased from the necessity of taking ordinary precautions for her safety. Negligence of the company's employees in these particulars was no excuse for negligence on her part. She was bound to listen and to look, before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into the place of possible danger.'" (Emphasis added.)

Accord:

Flemming v. W. P. R. Co., 49 Cal. 253;

Holmes v. Ry Co., 97 Cal. 161, 170, 31 Pac. 834;

Green v. So. Cal. Ry. Co., 138 Cal. 1, 7, 70 Pac. 926;

Herbert v. So. Pac. Co., 121 Cal. 227, 53 Pac. 651;[37]

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37. The facts relied upon were that the bell and whistle were not sounded and the fireman was not in his place. The Court said: "The argument, of course, is that if the signals had been given plaintiff might have heard, and, not hearing them, he had the right to assume when about to make the crossing that the train had not then reached the whistling post thirteen hundred and twenty feet above, and that the fireman might have seen him in time to have prevented the accident had he been upon the lookout. It may be that all this was culpable negligence on the part of defendant's employees. The defense of contributory negli-

Sego v. So. Pac. Co., 137 Cal. 405, 70 Pac. 279;[38]

Green v. Los Angeles etc. Ry. Co., 143 Cal. 31, 76 Pac. 719;[39]

Koch v. Southern Cal. Ry. Co., 148 Cal. 677, 84 Pac. 176;[40]

Martin v. So. Pac. Co., 150 Cal. 124, 88 Pac. 701;[41]

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gence implies that defendant may have been guilty of such negligence as would justify a recovery by the plaintiff if he were not also in fault. This is no argument, therefore, against the position of the defendant."

38. The Court said: "It appeals to sound reason that, even conceding a railroad company to be guilty of willful and wanton negligence in handling its train, still those acts upon its part can be no excuse for the traveler to close his eyes to approaching danger and rush blindly into it. No conduct on the part of the company, no matter how willful and wanton, will relieve a person from using ordinary care in preserving himself from danger and consequent injury."

39. Here it was argued that the precautions taken would have been entirely sufficient "if the train had not been running at a reckless rate of speed, and that the plaintiff had a right to assume that it would only move at a lawful and proper rate." The argument was answered by a quotation of the language quoted above (footnote 37) from the Herbert Case, and the Court itself added: "There is, in other words, no occasion for the application of the rule as to contributory negligence, except in cases where it is shown or assumed that the defendant has been guilty of actionable negligence."

40. The Court said: "A railway crossing is itself a place of danger and is an effectual warning of danger, a warning which must always be heeded, and the exercise of ordinary care in traveling over such a place is not excused by the negligent omission of the railway company itself to exercise reasonable care."

41. In this case it is said, "that notwithstanding the employees operating a train may be guilty of negligence in failing to give the statutory signals," still, if by obeying the stop, look, and listen rule the traveler could have discovered the approach of the train and himself have avoided danger, "his failure to do so will constitute contributory negligence."

Griffin v. San Pedro etc. R. Co., 170 Cal. 772, 151 Pac. 282;[42]

The matter was reinvestigated at large in *Larrabee v. W. P. Ry. Co.,* 173 Cal. 743, 161 Pac. 750, the *Griffin* and *Koch Cases* were followed and two earlier cases were disapproved for intimating that the rule was to the contrary. Two later cases applying the rule of the *Larrabee Case* are *N. Y. etc. Co. v. U. R. R.,* 191 Cal. 96, 215 Pac. 72,[43] and *Koster v. S. P. Co.,* 207 Cal. 753, 279 Pac. 788.

See also:

So. Pac. Co. v. Day, 38 F.2d 958 (C.C.A. 9);

Chicago etc. Co. v. Houston, 95 U.S. 697, 24 L.ed. 542;

N. P. R. Co. v. Freeman, 174 U.S. 379, 43 L.ed. 1014;

Schofield v. Ry. Co., 114 U.S. 615, 29 L.ed. 224;

Calloway v. Penn. R. Co., 62 F.2d 27 (C.C.A. 4).

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42. This case contains a rather extensive review of earlier California cases, and the Court said, referring to the duty of a traveler on a highway approaching a railroad crossing: "It is his duty to use all of his faculties, and it is not enough if he merely listens, believing that the people in charge of any approaching engine will ring a bell or sound a whistle. * * * A person approaching a railway track which is itself a warning of danger must take advantage of every reasonable opportunity to look and listen. * * * A traveler who is about to cross a railway track at a place where ordinarily the engineer gives appropriate signals of the approach of the train, may not depend upon such custom or even upon a duty enjoined by law, to give such signals."

43. The Court said that a truck driver "was not justified in relying upon the assumption that the motorman would not in any way be negligent in the operation of his car, and, therefore, the driver was not warranted in believing that the car was being operated at the usual and ordinary rate of speed."

It will probably be urged that the instruction immediately following the one complained of cured the error. That is not true. The error in the instruction complained of is more pointed. By the following instruction (R. 380), the court told the jury that if John or the other occupants of the car were negligent, their negligence would not be excused by the negligence of the defendant. That is a correct statement of the law, but it does not reach the vice of the previous instruction and does not cure it. By the instruction complained of, the jury was told that in measuring the standard of care required of them, the circumstances should be viewed in the light of the assumption by them that defendant would use due care. They can make no such assumption. They cannot rely on any particular anticipated conduct of the defendant. By the following instruction, the jury was merely told that if they found John or the occupants of the car were negligent, on the basis of the standard set by the instruction complained of, they would not be excused, because of negligence on the part of the defendant.

Specific instructions at other points in the charge as to the duty of the driver to stop, look, and listen likewise did not cure the error of this instruction. By this instruction, the jury was told that the driver need only stop, look, and listen to the extent necessary to protect himself from harm from a train being operated cautiously and with due care, that is, in looking, he need only look for a train being operated at a careful and cautious speed; or in listening, he need only listen for the whistle or bell that should be blown or rung. That is not the law, he "must take advantage of every reasonable opportunity to look and listen."[44]

44. Griffin Case, supra, see footnote 42 above.

The instruction set a false standard by which the conduct of the driver and occupants of the car was to be measured. It was prejudicial.

Upon the other hand, it is equally well settled that the operators of the railroad equipment are entitled to presume that any person approaching the railroad track would perform the duty imposed on him and would use due care and caution. Defendant's proposed instruction No. 27, refused by the court, would have so instructed the jury. The instruction is clearly correct.

In *Bashan v. S. P. Co.,* 176 Cal. 320, 324, 168 Pac. 366, the court said:

> "The persons thus operating a train have the right to assume that the other party will exercise his faculties and use ordinary care for his own safety."

The rule is too well settled to warrant further discussion. If further authority is necessary, the following can be consulted:

Holmes v. Ry. Co., 97 Cal. 161, 31 Pac. 834;[45]

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45. A passenger waiting for a train at a station was struck by the incoming train. "If it be assumed that the deceased was actually seen by those in charge of the train before the whistle sounded, still we do not think, under the facts here appearing, that the engineer was guilty of any negligence in not sounding the alarm-whistle before he did. In addition to the noise which was made by the moving train, the usual signal of its approach was given by ringing the bell, and as the deceased was a man of mature years, and nothing to indicate that he was not able to take care of himself,—as he was in fact,—the engineer might reasonably believe that he knew of its approach, and would, in obedience to the ordinary instinct for self-preservation, move away from the track before being overtaken by the engine." It was also held that the deceased was guilty of contributory negligence as matter of law.

Green v. Los Angeles, etc. Co., 143 Cal. 31, 76 Pac. 719;[46]

Lambert v. S. P. R. Co., 146 Cal. 231, 79 Pac. 873;[47]

Arnold v. S. F.-O.-T. Rys., 175 Cal. 1, 164 Pac. 798;[48]

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46. The Court said: "During all the time that she was approaching along the pathway to the crossing she was in a position of absolute safety, and there is no rule of law which charged the engineer with knowledge that she was about to change her position of safety for one of peril. On the contrary, the engineer had a right to assume that she was in possession of her faculties and would retain her place of safety, and not recklessly expose herself to danger. To hold that the engineer, because she gave no indication of knowledge of the approach of the train, was bound to assume that she would heedlessly leave a place of safety, put herself upon the track, and endanger her life, would be to revise the rule which, as far as we are advised, is universal in all jurisdictions, and certainly is the rule in this state, that where an engineer sees a person approaching a track he has the right to presume that the person is in possession of his ordinary faculties, alert to the danger which may ensue from passing trans, that he will not attempt to cross in view of the train, and is therefore not required to check the speed of the train to enable him to cross in front of it, or to ascertain whether he is about to do so."

47. "The fireman did not know that the plaintiff was deaf, and was not bound to assume that the driver of a team so approaching a crossing in broad daylight, with an unobstructed view—the team merely trotting along—would not check his horses in a place of safety." Here there was testimony that the train was not sounding either bell or whistle.

48. "The defendant's motorman was not required to presume that Arnold would not perform this duty. He had the right to presume that Arnold would stop or turn aside, until the conduct of Arnold was such as should reasonably have led him to apprehend the contrary. So long as it appeared that Arnold, with reasonable care, could stop his automobile, or turn it to one side or the other, so as to avoid a collision, and there were no obvious indications that he might not do so, the motorman had the right to assume that he would do so and upon that assumption to proceed along the track (*Thompson v. Los Angeles etc. Co.,* 165 Cal. 748, [134 Pac. 709])."

Busch v. L. A. Ry. Co., 178 Cal. 536, 539, 174 Pac. 665;[49]

Young v. S. P. Co., 182 Cal. 369, 380, 190 Pac. 36;[50]

Depons v. Ariss, 182 Cal. 485, 487, 188 Pac. 797;[51]

Billig v. S. P. Co., 192 Cal. 357, 363, 364, 219 Pac. 992;[52]

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49. An instruction which announced the rule was approved.

50. The trainmen "had a right to rely upon" the traveler's "continuing obligation to observe the approach of the train."

51. A truck struck a man who was on foot, killing him. "Under these circumstances no duty was imposed upon the driver of the truck to assume that deceased would suddenly expose himself to imminent peril. On the contrary, he had a right to conclude that he would not recklessly move directly in front of the approaching machine." For this the court cites the *Green* and *Basham Cases.*

52. The court quotes *Young v. S. P. Co.,* 189 Cal. 746, 210 Pac. 259, in part as follows: "The law presumes that a person possessing normal faculties of sight and hearing must have seen and heard that which was within the range of his sight and hearing." It then goes on:

"Turning from the right and duty of persons approaching upon a highway at its intersection with a suburban railroad to the right and duty of the engineer or motorman in charge of such suburban train or car in approaching such intersection, this Court was held in numerous and uniform cases that such engineer and motorman has the right to presume that a person thus approaching the crossing of a suburban railway will perform the duty which the law imposes upon him under the foregoing authorities, and in the reasonable exercise of his faculties of observation and caution will not essay such crossing until the danger due to the approaching train or car has passed, and it has accordingly been held that the operator of such train or car was not bound to check the otherwise rightful speed of his train or car in approaching and passing such crossing until at least he has reason to believe that such person so approaching such crossing is not performing, or is not likely to perform, his duty in the foregoing

McNeil v. East Bay Street Rys., 220 Cal. 591, 598, 599, 32 Pac.(2d) 598;[53]

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regard. In the case of *Basham v. Southern Pac. Co.*, 176 Cal. 320 [168 Pac. 359], the rule is thus stated: 'When a person is approaching a place of danger and all of the warnings of the danger have been given that reasonable care requires, those in charge of the dangerous engine, seeing him thus acting, are not obliged to presume, and it cannot be said that they act unreasonably in not presuming, that the person will continue his approach until he gets into the very place of danger, when it is obvious that he could with the least care stop and avoid it'."

53. A railroad train struck a street car. A street car passenger was injured. A judgment against the railroad and its engine men was reversed and the judgment against the street car company was affirmed. The court had this to say: "These defendants claim they were not negligent. We think there is no evidence that they were. It is not claimed that there was any act of negligence unless the engineer or the fireman was negligent. As to the engineer it is clear that he was at his post of duty and duly attentive. There is not a particle of evidence that any stop signal or sign of danger was seen or could have been seen by him, or that he could have seen the street car. As to the fireman he was at his post of duty and duly attentive. It is true he saw the street car and saw its movements. Considering all of the facts as recited above, nothing shows or tends to show that he was negligent. He was not called upon to stop the train nor to notify the engineer until he became aware that the street car was actually going to attempt to cross the track in front of the oncoming train. When the fireman was exercising due care regarding the agency which he was helping to operate he had the right to assume that the motorman in charge of the street car would exercise due care and would not actually attempt to cross the track. (*Young v. Southern Pac. Co.*, 189 Cal. 746, 754 [210 Pac. 259]; *Green v. Los Angeles etc. Ry. Co.*, 143 Cal. 31 [76 Pac. 719, 101 Am. St. Rep. 68].) When, thereafter, he came to a realization that the motorman was going to make said attempt the fireman acted promptly. But it was then too late. Be that as it may, such facts do not show negligence on the part of any one of these defendants."

Matteson v. S. P. Co., 6 Cal. App. 318, 92 Pac. 101;[54]
Schooley v. Fresno Traction Co., 56 Cal. App. 705, 711, 206 Pac. 481;[55]

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54. The court approved instructions giving to the jury the rule with which we are here concerned.

55. The court said: "That testimony shows beyond question that the deceased was negligent in stepping upon the tracks of the defendant company, directly in front of an on-coming car, which was plainly in view at the time he stepped upon the track if deceased had chosen to glance in its direction. * * * Surely, under the language of the cases hereafter cited, and under any rational system of law, defendant could not be charged with a duty to anticipate that anyone would suddenly step from a place of safety on to the car tracks in the middle of a block, directly in front of an approaching street car.

"We think such gross negligence on the part of a pedestrian will bar all right of recovery for any injuries which he may sustain. It is said in 25 R.C.L., p. 1285: 'However, where a foot-passenger walks or steps directly in front of an approaching car and is struck the instant he sets his foot between the rails there is but one inference that can reasonably be drawn from that fact, that is, the inference of contributory negligence.' * * *

"In the case of *Lee v. Market St. Ry. Co.*, 135 Cal. 293 [67 Pac. 765], it is said: 'That a man under these circumstances should thus heedlessly cross a public street in the middle of the block and know nothing of the approach of a street car until the moment when it struck him is a demonstration of carelessness and negligence so complete as to require no comment.' * * *

"There is no proof that the motorman failed to keep an outlook or that he failed to use proper care in stopping the car after discovering deceased's peril. Indeed, it is plain that if the deceased stepped over the rail and was almost instantly struck, as appears in the present case, then no outlook which the motorman could possibly have kept would have enabled him to stop the car in time to avoid the accident. Deceased was not in a position of peril until he stepped upon the rail and he could not have taken more than a step or two, going at an ordinary gait, before he was struck. Until almost the moment he was struck, then, no outlook would have disclosed him in a position of danger, for he was not in such a position. * * *"

Dolon v. Green, 72 C.A.2d 427, 436, 164 Pac.(2d) 795;[56]

Gore v. Market Street Ry. Co., 4 C.2d 154, 157, 48 Pac.(2d) 2;[57]

Rather v. San Francisco, 81 C.A.2d 625, 184 Pac.(2d) 727;[58]

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56. The court quotes and follows the *Billig Case,* above.

57. Street car and pedestrian. "Had the motorman seen plaintiff before she passed from the westbound to the eastbound tracks, and in time to stop the car, he still could not have foreseen that she would leave her place of safety on said westbound tracks. He had the right to assume that she would maintain her position there; her presence would have afforded no warning that she would proceed in the path of the car." It was also held the pedestrian was guilty of contributory negligence. An order denying a motion for judgment notwithstanding the verdict in favor of plaintiff was reversed.

58. "In *Korchack v. Pacific Electric Ry. Co.,* 9 Cal. App. 2d 89, 93 [48 P.2d 752], the court said:

" 'During all of the time that a pedestrian is approaching a railroad track he is in a position of absolute safety. The law is well established that an engineer or a motorman is not charged with knowledge that the pedestrian will change his position to one of peril, but he has a right to assume that the pedestrian will exercise his faculties of observation and caution, and will not remove himself from a place of safety and recklessly expose himself to danger, when it is obvious that with the slightest care he could stop and avoid the peril. (*Green v. Los Angeles Terminal Ry. Co.,* 143 Cal. 31 [76 P. 719, 101 Am. St. Rep. 68]; *Billig v. Southern Pacific Co.,* supra [192 Cal. 357 (219 P. 992)]; *Basham v. Southern Pacific Co.,* 176 Cal. 320 [168 P. 359]; *Holmes v. South Pacific Coast Ry. Co.,* 97 Cal. 161 [31 P. 834]; *Green v. Southern Pacific Co.,* 122 Cal. 563 [55 P. 577]; *Choquette v. Key System Transit Co.,* supra [118 Cal. App. 643 (5 P. 2d 921)].)' "

Levin v. Brown, 81 C.A.2d 913, 918, 185 Pac.(2d) 329.[59]

The proposed instruction goes to the very heart of the standard of care required by defendant. It is the basis on which the conduct of defendant is to be measured. The only charge of negligence is in the operation of the train. Specific instructions were given as to speed, whistle and bell. Aside from this, the jury was given no standard by which to measure the conduct of the defendant. The verdict was general. We cannot determine the basis for the finding of the jury that defendant was negligent. On the questions of speed, whistle and bell, the evidence was sharply conflicting. It is possible that the jury could have found for the defendant, on the evidence presented, on the issues of speed, whistle and bell, but nevertheless have determined that the defendant was negligent for not anticipating that the driver would proceed across the tracks in front of the train. The proposed instruction would have filled the gap.

In fact, on the evidence presented, the jury should have found for the defendant on these issues. The evidence is as follows:

Speed: For the defendant—The engineer is dead and his testimony is unavailable. Mellolo, a brakeman riding

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59. "A motorman is not charged with knowledge that a pedestrian will leave a place of safety for one of grave peril, or that he will not exercise his faculties of observation and caution and recklessly expose himself to danger, when it is clear that by merely seeing an obvious, destructive engine and by remaining off its fixed and certain path he would be assured of his safety. (*Korchak v. Pacific Electric Railway Co.,* 9 Cal. App. 2d 89, 93 [48 P. 2d 752].)"

in the cab of the engine, fixed the speed at 40 M.P.H. (R. 255). Brown, independent eye witness, estimated speed at 40 M.P.H. (R. 324). Stetson, independent eye witness, estimated speed at 30 M.P.H. (R. 334), between 20 to 30 M.P.H. (R. 347), and about 10 M.P.H. faster than the speed of the Souza automobile (R. 346).

For the plaintiff—John had no estimate of the speed of the engine. Davis estimated the speed at 60 M.P.H. (R. 172). Johnston estimated the speed at 65 to 70 M.P.H. (R. 425).

Whistle and Bell: For the defendant—Mellolo testified the regular crossing whistle was blown (R. 256), and just prior to the accident an emergency whistle, a series of consecutive short blasts, was blown, and the whistle continued to blow up to and after the accident[60] (R. 255-6, 264, 265, 267, 268), but could not state as to the bell ring-

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60. On cross-examination Mellolo testified: "Q. As a matter of fact, Mr. Mellolo, you do not have any independent memory of a whistle being sounded at Beckwith Road, do you?

A. I do, sir.

Q. Then your memory in that regard immediately at the time the engine went into emergency and you saw particles of the automobile flying, there was a series of short blasts, isn't that true?

A. The whistle was blowing, and if you ever ride an engine and it is your first time that you have ever seen anybody hit by a locomotive, you will never forget seeing it, and you will never forget that whistle. That was my first experience on a locomotive hitting an automobile.

Q. Just come back to my question. The whistle that you are talking about, however, was a series of short blasts that took place immediately at the time this car was struck, isn't that true?

A. He blew the crossing whistle between the crossing sign post and the crossing, and then after that there was a consecutive short blast" (R. 267).

ing because of the noise in the cab of the engine[61] (R. 257). Mrs. Krepps, independent witness, at her home located approximately 200 feet south of the tracks and 400 feet southeast of the crossing, heard "the train whistle and it whistled and whistled and then I heard it crash and I run around the corner of the house and saw the car"[62] (R. 310). She could not remember the bell ringing (R. 311). Mrs. Disbrow, independent witness, in bed reading

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61. Q. [by Mr. Dunne] Can you tell us whether or not as the locomotive approached this crossing where the accident happened, whether the engine bell was ringing?

A. No, I can't state because there are times you can hear the bell ringing and there are times you can't hear it ringing on an engine. When you go by buildings and signboards you can hear it ring; the echo, I believe. There are times you can't hear the bell ringing in the cab of the engine traveling at that speed.

Q. With the locomotive traveling light that way, is the locomotive itself, aside from any bell or whistle, making any noise?

A. Yes.

Q. You have been in a cab and all this is clear to you, but I wish you would tell the ladies and gentlemen who probably have not been in a cab what the noise in the cab is.

A. Well, it is a pounding noise, a rattling noise. It is almost impossible to talk in the cab of an engine traveling 35 to 40 miles an hour from the rattling and pounding of the engine. You have to scream in order to talk" (R. 257).

62. On cross-examination Mrs. Krepps testified: "Q. There was no difference between the whistle, in the middle of which you heard the crash, and the whistle that you heard after the crash, was there?

A. Well, I don't know. I know there was whistling and all at once I heard the crash, and then it whistled, I think, three times after that.

Q. How many times did it whistle before that?

A. Gosh, it was whistling when it was coming down the track before the crash.

Q. You recall that there was more than one whistle?

A. Yes, there was more than one whistle" (R. 313).

a book at the home of her mother, Mrs. Krepps, testified that her attention was drawn from her book by the insistent whistling[63] (R. 318). She did not hear the bell (R. 318). Brown heard the whistles and the noise of the engine (R. 323) but was not asked as to the bell. Stetson's attention was attracted while the engine was still more than 700 feet from the crossing by the noise of the rattling and pounding of the engine and the bell, but could not state whether or not the whistle was blown[64] (R. 333, 334, 335, 338, 340).

For the plaintiff—John did not hear the whistle[65] (R.

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63. "Q. [by Mr. Dunne] What, if anything, first called your attention to the fact that there was an accident?

A. My attention was drawn from my book by the insistent whistling of the train. The train whistled more than it usually did when it made the crossing there, and I heard a crash, but I didn't pay too much attention to it until my mother called me and said there had been an accident" (R. 318).

64. Stetson was standing in the gas station, approximately 230 feet from the crossing. He testified: "Q. [by Mr. Dunne] One other thing. Are you able to tell us anything about a whistle on the locomotive, whether it was or was not sounded, or do you know?

A. I couldn't say whether it was blowing or whether it wasn't. It could have been blowing or wasn't blowing. That didn't attract my attention, at all. The whistle, it could have been blown or might not have been.

The Court: Q. What attracted your attention?

A. The bell on the engine and the rattling of the wheels on the engine" (R. 335).

65. "Q. [by Mr. Myers] When you stopped your automobile 20 feet from the crossing, will you tell us whether or not you listened?

A. Yes, I did.

Q. What, if anything, did you hear?

A. I didn't hear anything" (R. 109).

109). Davis heard one blast of the whistle just after the engine crossed North Avenue (R. 168). At the time of the accident Davis was over 1100 feet from the crossing. Johnston stated the bell was not rung (R. 426) and the whistle was not blown (R. 425, 426).

The testimony of Johnston and Davis must be viewed in the light of the contradictions, inconsistencies, improbabilities and the unusual circumstances surrounding their testimony.

Johnston had been employed by defendant Southern Pacific Company only two months before the accident. He refused to disclose the railroads for which he had previously worked (R. 441-2). He left the employ of defendant two weeks after the accident. He was named as a party defendant in the original actions filed in the State Court. Although he had not been served with process or subpoena, he voluntarily left his home in Florida and appeared prior to the time set for the trial in the State Court, for the purpose of testifying on behalf of the

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"Q. [by Mr. Myers] First, Mr. Souza, was the window on your side of the car open, or was it closed?

A. It was open.

Q. How about the window on the other side of the car, was it open, or closed, that is, the righthand side?

A. It was closed.

Q. Tell us whether you heard any bell ringing, or whistle blowing immediately prior to the time the accident happened.

A. No, I did not hear anything.

Q. When you looked up and saw the locomotive 50 to 75 feet away from you, did you hear anything then?

A. No, I couldn't hear anything.

Q. Could you say whether the engine was working steam or not?

A. I couldn't tell; it was too quick" (R. 110-111).

plaintiff. The cases were called for trial in the State Court and plaintiffs announced they were ready to proceed, without having served him with process. After the case was removed to the Federal Court, he was served with process, but made no appearance, and no default was taken. This was the state of the case when his deposition was taken by plaintiff, and thereafter the case was dismissed as to him. With the death of the engineer, the only living person who could be charged with responsibility for this accident, which plaintiff's attorney characterized as murder, is Johnston. It is strange indeed that the action was voluntarily dismissed as to him. Shortly after the accident he made a written report (Dft's Ex. Q), and on the trial denied it in every particular. The details of that report were confirmed by Mellolo on the trial, and by the report submitted by engineer Glanville. His present story is contradicted by independent eye witnesses who have no reason to testify as to anything except what they saw and heard.

Davis was employed by a neighbor and friend of the Souzas. He was impeached from his deposition, he even changed the place where he claims to have been when he saw the accident. He claims to have been able to keep the locomotive in sight at all times from the North Avenue crossing until it came to a stop, according to him, a 1000 feet or more beyond the point of the accident, more than 2160 feet from the point where he was. He claims this in spite of his testimony that visibility was limited to 250 to 300 feet (R. 171), and without regard for the fact that trees between him and the tracks must have prevented him from seeing the locomotive. These trees are shown by

the photographs in evidence, and were located and fixed by actual measurements on the ground by the engineer who prepared the diagrams reproduced herein. On his testimony he was never in front of the locomotive, or in a position to see the front of the locomotive, yet he was willing to testify of his own knowledge that the front of the locomotive was painted silver (R. 170).

In these circumstances the jury could well have, and should have, disregarded the testimony of Johnston and Davis, which leaves for the plaintiff only the testimony of John, which is essentially negative in all important particulars, or involves only "I don't recall" or "I don't remember." The jury could have, and should have, believed the testimony of the independent witnesses on the question of the speed, whistle and bell, as confirmed by the only available and unimpeached member of the crew. It cannot be doubted that failure to give defendant's proposed instruction No. 27 was prejudicial.

Even assuming that plaintiff's instruction No. 9 as given by the court was proper, to single out the right of plaintiff to rely on the assumption of due care by defendant, without mention of the corresponding right of defendant, was to give undue prominence to one matter to the exclusion of an equally important matter. Such is error. *Rio Grande W. Ry. Co. v. Leak,* 163 U.S. 280, 41 L.ed. 160, 16 S.Ct. 1020. It is reversible error to submit the evidence and theory of one party prominently and fully and not call attention to the main points of the opposite party's case. *Pullman Company v. Hall,* 46 Fed. 2d 399; *Weiss v. Bethlehem Iron Co.,* (C.C.A. 3d) 88 Fed. 23, 30.

E. The Question of Joint Venture Should Have Been Submitted to the Jury and It Was Error to Refuse Instructions Properly Submitting the Issue.

We recognize the requirements necessary to establish a joint venture or joint enterprise. Whether John and his father and brother were engaged in a common undertaking in which they had the necessary community of interest was a question that should have been determined by the jury and not by the court. There was ample evidence from which the jury could have found a joint enterprise or they could have found none. The trial court refused defense instructions Nos. 38 and 39 which correctly stated the rules of law applicable to joint ventures and would have left it to the jury to decide, as it should, this basic question of fact.

It was established by the evidence that all three of the occupants of the car lived on a dairy ranch near Modesto (R. 98-99).

On the evening before the accident, John had read an advertisement in the paper of a ranch for lease (R. 118). All three of them, John, his father and his brother Edward, discussed it the night before and they decided they would look at it and pass their opinion on it (R. 79). It was the intent to stock it with beef, but John did not have the money to buy the beef (R. 119). It had not been determined how the enterprise was to be financed, but John couldn't do it alone. The details were still under discussion. In any event, John was a minor and any lease or contract made would have to be made to or by the father or older brother, Edward.

John testified his father and brother were to give their "approval" (R. 101) of the ranch. They were to give their help and advice (R. 122).

It was for the jury and not for the court to draw the inferences from this evidence.

F. Other Errors in Instructions.

The court refused to give defendant's proposed instruction No. 56 which would have told the jury that if the approach of the locomotive could have been learned, then the very fact of the collision raises a presumption either that the driver of the automobile did not take the required precautions and did not look or listen, or having looked and listened he endeavored to cross in front of the train, and in either event he would be guilty of negligence proximately contributing to the accident. There can be no question as to the propriety of the instruction. The rule is so well settled that it requires no discussion, and needs no additional authority other than the cases cited in the body of the instruction. If other authority is desired, see cases cited above at page 29.

Failure to give the instruction was particularly prejudicial in this case, in the light of the physical conditions. Visibility, at the very minimum was 600 feet. The view was unobstructed. The driver of the automobile, by the merest glance, the slightest turning of his head, must have seen the locomotive while he was still in a position of safety.

So also the failure to give defendant's proposed instruction No. 58, which in substance stated that if the circumstances were such that the driver, by looking, must have

seen the locomotive in time to have avoided it, any testimony that he looked and did not see may be disregarded by the jury, in the light of the physical facts and surroundings at the scene of the accident, was highly prejudicial. The correctness of the instruction is well settled, and needs no discussion. If authorities are needed, see cases set forth above at page 30.

Defendant's proposed instruction No. 58-A would have told the jury that the mere fact that two other persons were in the car, did not relieve them, or any of them, from the duty of exercising ordinary care with respect to the operation of the automobile. The court refused the instruction. The matter was not sufficiently covered by other instructions given as to the general duty of each of the occupants of the car to exercise ordinary care for his own safety, the duty of each extends to the operation of the car. In the case of *Martindale v. A. T. & S. F. Ry. Co.,* 89 A.C.A. 459 (1948), 201 Pac.(2d) 48, judgment for the defendant was affirmed, and the court said:

> "While a passenger who has no control over the automobile or the driver is not held to the same rule as to contributory negligence as the driver and it is not demanded of the passenger that he exercise the same high degree of observation as is required by the driver (see *Hoffart v. Southern Pacific Co.,* 33 Cal. App. 2d 591, 596 [92 P.2d 436]; *Switzler v. Atchison, etc. Co.,* 104 Cal. App. 138, 144 [285 P. 918]), nevertheless he is normally bound to protest against actual negligence or recklessness of the driver, the extent of his duty in this regard depending upon the particular circumstances of each case, and it is a question for the jury (*Wagner v. Atchison Co.,* 210 Cal. 526, 528

[292 P. 645]). It is presumed that a person possessing normal faculties of sight and hearing must have seen and heard that which was within the range of his sight and hearing (*Young v. Southern Pacific Co.,* 189 Cal. 746, 754 [210 P. 259]; *Cate v. Fresno Traction Co.,* 213 Cal. 190, 195-6 [2 P.2d 364].) Therefore it was a question for the jury to determine whether the passengers in Martindale's car should have heard or seen the train."

It has been repeatedly held that this is a matter that should be submitted to the jury, and the refusal of this instruction and the failure to submit this issue to the jury was prejudicial, particularly in light of the physical facts and surroundings at the time of the accident, where either of the occupants of the automobile, as well as the driver, must have learned of the presence of the locomotive by a mere glance or the slightest turning of the head. The occupants, as well as the driver, were facing half-way in the direction from which the locomotive was coming (see footnote 32).

CONCLUSION

In this case it cannot be seriously contended that John Souza exercised ordinary care in driving his automobile up to and on the tracks with a locomotive bearing down on him plainly visible to him, had he looked, for at least the last 600 feet of its approach to the crossing. Since he was approaching the locomotive half-way head on, it required only the slightest glance to his right to see what should have been seen by looking. He admits he did not look. If he had, the unfortunate accident would never have occurred.

In such circumstances the authorities have long recognized and still hold fast to the rule that the trial court should and must rule that the driver is guilty of contributory negligence as matter of law. The dilemma of the plaintiffs' position is clear. There are only three choices; either John didn't look when by looking he could have stopped; or having looked he didn't see that which he could have seen; or having looked and seen, he mistakenly thought he could proceed across in safety.

There is no choice consistent with the exercise of ordinary care on the part of the driver. There being none, the rule is one of law.

To submit the issue to the jury was error. The error in submitting it was made the worse by the instructions of the court. These errors affect all three cases and their prejudicial effect is best demonstrated by the verdicts of the jury.

It will be necessary for this court to overrule every known California case involving accidents at railroad crossings if John Souza's conduct, according to his own testimony, is ordinary care.

It is respectfully submitted that the Jury's verdicts and the judgments thereon should not be permitted to stand and should be reversed.

Dated at San Francisco, California, July 1, 1949.

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